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Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada

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**Precarious Pathways:
Evaluating the Provincial Nominee Programs in Canada**

A research paper for the Law Commission of Ontario

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Contents

1. Introduction.....	1
2. Who are Temporary Foreign Workers?.....	6
2.1 Significance of Workers' Temporary Status	11
2.2 Race and Gender Dimensions.....	12
2.3 The Equality Rationale for Permanent Residency.....	13
3. Overview of the Provincial Nominee Programs (PNPs).....	14
3.1.1 General Features Common to PNPs	20
4. Evaluating the Nominee Programs: Institutional Design and Practice.....	27
4.1 Background to the Case Studies	29
4.2 Recruitment and Selection Processes Increase Opportunities for Abuse	31
4.3 Program Complexity and Instability Increase Workers' Uncertainty	36
4.4 Employer Responsibilities for Service Provision Increases Risks for Workers.....	38
4.5 Program Design Fails to Address Dimensions of Race and Gender	41
5. The Role of Organized Labour	42
6. Lessons for Ontario (and Others).....	47

1. Introduction

Temporary foreign workers in Canada experience substandard employment relationships, are explicitly denied many formal rights and are practically excluded from most employment protections.¹ Existing labour and human rights standards, organized labour regimes, and constitutional rights and freedoms have all been ineffective safeguards for these individuals against exploitation and insecurity. Led by a growing emphasis on workers' temporary status as a root cause of their employment-related vulnerabilities,² some advocates, as well as elected officials, are now calling on governments to improve opportunities for workers to attain permanent residency in Canada, primarily for those in lower-skilled occupations.

Provincial immigrant nominee programs (PNPs) are increasingly prominent but largely unexamined options for these workers. In a recent report, the House of Commons Standing Committee on Citizenship and Immigration recommended that “the federal government initiate dialogue and facilitate cooperation with the provinces and territories, so that the temporary

¹Sheila Fraser, *Report of the Auditor General of Canada to the House of Commons, Chapter 2: Selecting Foreign Workers Under the Immigration Program* (Ottawa: Office of the Auditor General of Canada, 2009) <http://www.oag-bvg.gc.ca/internet/docs/parl_oag_200911_02_e.pdf> [Fraser]. See also House of Commons Standing Committee on Citizenship and Immigration, “Temporary Foreign Workers and Non-status Workers” May 2009, 20th Parliament, 2nd Session [“House of Commons Standing Committee Report on Temporary Foreign Workers”] at 27. In November 2009, The Toronto Star published an informative three-part investigative series on temporary foreign worker programs in Canada, see Sandro Contenta and Laurie Monsebraaten, “A Temporary Worker’s Catch-22” *The Toronto Star* (2 November, 2009) online: TheStar.com <<http://www.thestar.com/news/investigations/article/719602>>; Sandro Contenta and Laurie Monsebraaten, “Manitoba welcome host for guest workers in Canada” *The Toronto Star* (3 November, 2009) online: TheStar.com <<http://www.thestar.com/news/investigations/article/720163>>.

² Temporary status workers should be distinguished here from non-status workers. Non-status workers, sometimes called “illegal workers”, are foreign individuals working in Canada without authorization under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] in the form of a temporary work permit or permanent residency status. While non-status workers are narrowly defined as those employed without legal authorization, these workers can also be seen to exist along a spectrum of “precarious status”, a term used to denote the social production of illegality according to the absence of one or more factors including work authorization, a residency permit, independence from third parties, and social citizenship rights, see Luin Goldring, Carolina Berinstein and Judith K. Bernhard, “Institutionalizing precarious migratory status in Canada” (2009) 13 *Citizenship Studies* 239 [Goldring, Berinstein and Bernhard].

The challenges facing non-status workers – particularly those who come to Canada initially as temporary foreign workers – are closely related to questions surrounding pathways to permanent residency for foreign workers, however they are not explored in detail in this paper. For an early overview of the issue see Marina Jimenez, “200,000 illegal immigrants toiling in Canada’s underground economy” *The Globe and Mail* (15 November 2003) Section A1.

foreign worker and provincial nominee programs function together smoothly to provide a pathway to permanent residency.”³ Governed under bilateral immigration agreements between Ottawa and the provinces, these programs enable provincial governments, in close partnership with private employers and other non-governmental actors,⁴ to nominate economic immigrants and their dependents for permanent residency.⁵ In fact, provincial immigration streams for lower-skilled foreign workers – in jurisdictions where these streams exist at all – are currently the *only* options for these individuals to acquire permanent status while they work in Canada as temporary residents.⁶

The central aim of this paper is to evaluate whether nominee programs are likely to address the real insecurities faced by vulnerable lower-skilled temporary foreign workers. An overarching lesson is that decision makers should be cautious about characterizing these programs as suitable “responses” to the complex employment insecurities produced by rapidly expanding, employer-driven temporary foreign worker programs (TFWPs) in Canada.⁷ The simplified assumption underlying current trends appears to be that transitioning workers from temporary to permanent status – by whatever route – provides the necessary protection against risks that foreign workers will become, or continue to be, trapped in conditions of substandard

³ “House of Commons Standing Committee Report on Temporary Foreign Workers”, *supra* note 2 at 11. See Yessy Byl, *Entrenching Exploitation: The Second Report of the Alberta Federation of Labour Temporary Foreign Worker Advocate* (Edmonton: 2009) <<http://www.afl.org/upload/TFWReport2009.pdf>> [Byl, “Entrenching Exploitation”]. See also House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 37th Parl. 2nd sess., No. 016 (12 May, 2009) (Pura Velasco, Caregivers Support Services).

Lower-skilled occupations in this paper are defined according to the National Occupational Classification Matrix (2006) published by Human Resources and Social Development Canada (HRSDC). Specifically, lower-skilled workers refer to those in NOC C (“occupations usually require secondary school and/or occupation-specific training) and D (“on-the-job training is usually provided”) classifications, see HRSDC, “National Occupational Classification Matrix 2006” online: <<http://www5.hrsdc.gc.ca/noc/English/NOC/2006/html/Matrix.html>>.

⁴ “Other non-governmental actors” refers to the possibility that actors in addition to private employers, such as non-governmental and community service organizations, may play important roles in both the nominee selection process and in providing protections and services for workers.

⁵ See Part III, below, for a full description of the legal and institutional framework for PNPs in Canada.

⁶ Not include special provisions for live-in caregivers as part of the federal TFWP.

⁷ For an overview of these challenges, see Fraser, *supra* note 1; see also “House of Commons Standing Committee Report on Temporary Foreign Workers”, *supra* note 2 at 27.

work. But this view fails to account for the reality that the temporary status of these workers is only one aspect of their vulnerability to exploitation and insecurity within ongoing employment relationships characterized by significant imbalances in bargaining power. Provincial nominee programs do not contemplate the dimensions of this imbalance that extend beyond (but are still connected to) workers' temporary status. As a result, the market-based, employer driven character of these pathways, coupled with specific design failures and the absence of public regulatory controls, is likely to further exacerbate existing insecurities for foreign workers in some circumstances.

In this study I examine four potential outcomes for foreign workers participating in the nominee programs:

- (1) Increased vulnerability to unscrupulous employers and third-party recruiters in the nominee selection process, which results from the high stakes associated with attaining permanent status;
- (2) Decreased capacity to navigate the already complex institutional environment that connects foreign worker programs and nomination processes because of rapidly changing eligibility requirements and insufficient access to information, which itself is largely controlled by employers and recruiters;
- (3) Increased reliance on employers to provide language and settlement services, linked with possibilities for creating a vacuum in services provision where governments have derogated public responsibility and when third-party actors are absent; and

- (4) Increased risks overall for the most vulnerable individuals, produced by a lack of attention to the dimensions of gender and racialization inherent in the TFWPs and carried over into the nominee programs.⁸

These failures at the provincial level can, in turn, be connected to problems of both horizontal and vertical coordination between jurisdictions. Because the federal government has actively devolved a share of control over economic immigration processes to the provinces – and then further to employers and other private actors – the resulting diversity of nominee program designs and practices poses special challenges in both respects. A noticeable lack of coordination between the provinces and the federal government on nominee program evaluation and on policy integration with national economic immigration strategies has created a situation in which the provinces remain unaccountable for the apparently haphazard development of some programs, despite the immediate impacts that these changes have on foreign workers. Similarly, the inability or unwillingness of provinces to coordinate their economic immigration policies and practices horizontally leaves each jurisdiction to “reinvent the wheel”, and leads to a greater risk of mismatched policy developments when one accounts for the fact that permanent workers’ constitutional mobility rights enable them to move freely between jurisdictions.⁹

In general, PNP models in Canada have been under-studied and unevaluated.¹⁰ Whereas the opaque policy development processes behind recent changes to TFWPs have led to demands

⁸ The significance of how the TFWPs and PNPs in Canada interact and are interrelated may too often be glossed over by official policy-makers. See for example House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parl. 2nd sess., No. 0 (2 April, 2009) (Eric Johansen, Director, Saskatchewan Immigrant Nominee Program, “The second reason I’d really stress the importance of the temporary foreign worker program for our province is that it really is a sister program to our nominee program. They need to work hand in glove”) [Johansen Evidence].

⁹ *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 at s. 6(2).

¹⁰ See Fraser, *supra* note 1 at 25-27. See also Naomi Alboim and Maytree, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies* (2009) online: Maytree <<http://www.maytree.com/wp-content/uploads/2009/07/adjustingthebalance-final.pdf>> [Alboim and Maytree] at 36.

for a halt to current trajectories and for broader public debate on the interests, rights and obligations at stake for temporary workers and the Canadian public,¹¹ similar calls for an open discussion on the PNPs have been mostly absent.¹² Policy directions surrounding the PNPs, like those related to TFWPs, are still being decided outside of the public view. An equally rigorous, transparent approach to reform should be applied to evaluate current and potential institutional arrangements for lower-skilled temporary workers to attain permanent status. Given that there are multiple potential pathways that could be designed for temporary workers to make the transition to permanent residency, a basic assumption of this study is that different paths are likely to lead to substantially different outcomes for workers, as well as for employers and communities. In all cases, these diverging outcomes should be assessed in terms of their overall efficacy at confronting individual workers' current insecurities and in terms of their long-term effects on governments' abilities to coordinate pathways between provincial jurisdictions and with the federal government.

The need to examine current practices and developing trends is especially pressing for those provinces that are either just beginning to explore the scope of their economic immigration powers or undertaking processes of reform. The Province of Ontario, for example, established a pilot nominee program as recently as 2008, through which only higher-skilled workers are eligible to be nominated for permanent residency. Addressing the question of whether this program should be extended to include lower-skilled workers provides one way to think about the

¹¹ See for example, House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parl. 2nd sess., No. 0 (16 April 2009) (Richard Clarke, President of the Nova Scotia Federal or Labour, "What has been most galling about the changes in the temporary foreign worker program is that these changes have been made without public debate. No party ever ran on a platform of promising easier access to cheap, exploited foreign workers. There was never a debate in Parliament. Instead, it appears that the business community asked for changes to this program and those changes were made").

¹² An exception is Alboim and Maytree, *supra*, note 10 at 34.

broader implications of using provincial nominations as a tool to target the precarious employment conditions confronting temporary foreign workers.

In Part II, I briefly discuss the relevant features of TFWPs in Canada. In all jurisdictions, these programs are the only conduits through which lower-skilled foreign workers enter the PNPs. In Part III, I map the legal and institutional structure of joint federal-provincial responsibilities for immigration in Canada, and compare different provincial approaches to nominee program development and operation. A substantial evaluation of PNP models follows in Part IV, using programs in Alberta and Manitoba as case studies to ground the discussion. In Part V, I discuss the role of organized labour as third-party actors in addressing some of the concerns that follow from PNP design and practice. Part VI concludes.

2. Who are Temporary Foreign Workers?

Temporary foreign workers are non-citizen individuals admitted to work in Canada for time-limited periods through immigration permits issued under the federal *Immigration and Refugee Protection Act (IRPA)*.¹³ Some of these workers are highly skilled, specialized workers employed on short-term work contracts, while others are lower-skilled workers who fill temporary or seasonal positions. Some of these lower-skilled individuals will work long-term in Canada under consecutive time-limited permits.

Officially, TFWPs are designed to address temporary or periodic labour shortages that result from insufficient supply in the domestic labour market. These supply shortages ostensibly derive either from the cyclical or season nature of some sectors, such as agriculture, or from systemic barriers to permanent immigration, such as backlogs in processing applications for permanent resident status and complications arising from the economic selection criteria for new

¹³*IRPA*, *supra* note 2.

immigrants. Temporary foreign workers are not, according to federal government policy, intended to fill “permanent” labour market gaps or to provide a long-term solution for present challenges in the immigration system.¹⁴

But it has become increasingly obvious that Canada’s heavy reliance on foreign labour belies the “temporary” nature of many foreign worker programs. The annual inflow of temporary foreign workers has accelerated in recent years, along with an increasing “stock” of these workers who continue to reside in Canada on multi-year or renewed work permits. The number of temporary foreign workers coming to Canada annually has nearly doubled in past decade, reaching a total annual inflow of 192,519 workers in 2008.¹⁵ At least 65,801 of these were lower-skilled workers – almost a fourfold increase since 1999.¹⁶ This inflow, combined with the number of temporary foreign workers still present in 2008, resulted in a total of 251,235 workers living in Canada with temporary status at the end of that year, 96,644 of whom were lower-skilled workers.¹⁷

Ontario received the highest number of temporary foreign workers of any province in 2008, at a total of 66,634 workers, although the proportion of lower-skilled workers is unknown.¹⁸ The province’s inflow of foreign workers has climbed by 26% since 1999, a relatively modest increase when compared to provinces such as Alberta (287%) and British

¹⁴ In fact, the “House of Commons Standing Committee Report on Temporary Foreign Workers”, *supra* note 3 at 6 recommended that the long term goal for policy in this area should be for the government to attenuate temporary foreign worker programs so they target specific work shortages, reducing the number of temporary foreign workers admitted to Canada overall.

¹⁵ Citizenship and Immigration Canada (CIC), “Facts and Figures: Immigration Overview – Permanent and Temporary Residents” (2008) online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/pdf/research-stats/facts2008.pdf>> [CIC, “Facts and Figures 2008”] at 49. The total entry of temporary foreign workers in 1998 was 100,436 workers.

¹⁶ *Ibid.* at 66. A total of 16,663 lower-skilled workers came to Canada in 1999.

¹⁷ *Ibid.* at 67.

¹⁸ *Ibid.* at 62.

Columbia (168%).¹⁹ There were over 91,000 temporary foreign workers living in Ontario at the end of 2008.²⁰ As a proportion of total provincial temporary and permanent residents, only in Alberta and British Columbia do temporary foreign workers compose more than 1% of the total population.²¹

A network of bureaucracies has evolved to administer this foreign labour regime at the national level. The federal government retains primary jurisdiction over the entry and subsequent repatriation of foreign workers, although some of these responsibilities have been devolved to provincial governments in recent years, as discussed in Part III, below.²² Federal administrative roles are shared Human Resources and Skills Development Canada (HRSDC) and Citizenship and Immigration (CIC). Employers seeking to hire a foreign worker apply to HRSDC for a Labour Market Opinion (LMO), which evaluates the likely impact of hiring these individuals on the Canadian labour market within a particular sector. LMOs take into account the foreign worker's expected occupation while in Canada, the wages and working conditions offered to workers by the employer in the terms of employment, the employer's advertisement and recruitment efforts, associated labour market benefit, and any external consultations with organized labour regarding effects on current labour disputes.²³ An LMO is then provided to CIC, the ministry ultimately responsible for issuing work permits to temporary workers pursuant to the *IRPA*.²⁴ There are several exemptions from the LMO requirement available to employers

¹⁹*Ibid.*

²⁰*Ibid.*

²¹Byl, "Entrenching Exploitation", *supra* note 3 at 7.

²²*Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 [*Constitution Act, 1867*] at s. 91(25).

²³CIC, "How to Hire a Temporary Foreign Worker (TFW): A Guidebook for Employers" (2009) online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/EnGLish/resources/publications/tfw-guide.asp>>. See *Immigration and Refugee Protection Regulations, S.O.R./2002-227 [IRPR]* at ss. 203(3), 198(2)(a)(i), 200(1)(c)(iii).

²⁴*IRPA, supra* note 2. See also Human Resources and Skills Development Canada (HRSDC), "Temporary Foreign Workers Program" (2009) online: HRSDC <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml>.

in certain occupations, such that a significant proportion of foreign workers who actually enter Canada as temporary workers will do so outside of the regular LMO process.²⁵

Several TFWP streams have emerged over time, each with their own set of employer requirements and each granting different entitlements to workers. These streams include specialized programs for academics, film and entertainment workers, information technology workers, seasonal agricultural workers, live-in caregivers, and oils sands construction workers in Alberta. Most significantly for the PNPs, the federal government also continues to operate a rapidly expanding “pilot project” for occupations requiring lower levels of formal training as a general program stream to facilitate the entry of the lower-skilled workers who are in growing demand in some regions and industries.²⁶ The experimental status of this project, however, is questionable. By the time the first formal evaluation of the so-called pilot program is completed by CIC in 2012, it will have been in operation for well over ten years. In light of its longevity and the large increases in the number of lower-skilled workers entering Canada through this stream in recent years, it is likely more accurate to characterize the program as a permanent and continuously expanding entity.

As a general rule, foreign workers can work in Canada for a maximum of 24 months under a single temporary visa, with the possibility of renewal upon reapplication to CIC,²⁷ however evidence suggests that at least some of these individuals work for extended periods in a

²⁵Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2009) 31 *Comparative Labour Law and Policy Journal* 5 [Fudge and MacPhail] at 12.

²⁶ See HRSDC, “Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)” (2009) online: Human Resources and Skills Development Canada <http://www.rhdcc-hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml>.

²⁷*IRPR*, *supra* note 23 at ss. 201.

Exceptions to this rule include seasonal agricultural workers, whose maximum term is eight months, and live-in caregivers, who can receive permits for up to three years plus three months. After working for 24 months within a 36-month period, caregivers may apply for permanent residency status – a provision that is unique among foreign worker programs, see *IRPR* at s. 113(1)(d). See also Sandra Elgersma, “Temporary Foreign Workers” (7 September 2007) Parliamentary Information and Research Service, Library of Parliament, Political and Social Affairs Division [Elgersma].

single employment position by renewing their permits for successive periods.²⁸ New amendments to the *Immigrant and Refugee Protection Regulations (IRPR)* proposed by the federal government in October 2009 will severely truncate foreign individuals' abilities to remain in Canada as serial temporary workers. The proposed new "four year and out" rule will limit workers to a cumulative period of 4 years of employment in Canada, after which time they must leave the country for a minimum period of 6 years. According to the federal government, these regulatory changes reinforce its official stance that TFWPs are designed to address temporary labour shortages, and not to facilitate the use of foreign workers to fill permanent labour market gaps. Moreover, the federal government has said that the proposed amendments are meant to "encourage the use of appropriate programs and pathways to permanent residence where available."²⁹ For lower-skilled foreign workers, the only available pathways to permanent residency, where they exist at all, are through existing PNP streams. The proposed *IRPR* amendments may therefore put pressure on provincial governments to increase reliance on their PNPs, and/or cause the federal government to evaluate alternative pathways to permanent residency for lower-skilled workers. Without significant changes to these institutions, or the design of alternatives, the new "four year and out" rule threatens to compound the vulnerable positions of lower-skilled individuals by reinforcing their temporary status and possibly driving them into the informal economy as non-status workers.³⁰

²⁸ Byl, "Entrenching Exploitation", *supra* note 3. The federal government's practice of renewing permits has been the topic of some confusion and dispute following the release of the Alberta Federation of Labour's report in 2008. See Fudge and McPhail, *supra* note 25 at footnote 72 for further discussion. These practices will likely change dramatically under the recently proposed amendments to the *IRPR*, see *infra* note 29.

²⁹ Canadian Gazette, "Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)" (10 October 2009) Vol. 143, No. 41, online: Canada < <http://www.gazette.gc.ca/rp-pr/p1/2009/2009-10-10/html/reg1-eng.html> > (proposed amendment to *IRPR*, *supra* note 23 at s. 200[3][g]).

³⁰ Alboim and Maytree, *supra* note 2 at 44 ("It is a concern, however, that the Canadian Experience Class excludes temporary workers who work in unskilled or low-skill jobs, even though this has recently been an area of significant growth in the Temporary Foreign Worker Program. The result is that about 40% of those recruited to Canada as temporary workers in 2007 will not qualify for the Canadian Experience Class. This means one of three things:

2.1 Significance of Workers' Temporary Status

Foreign workers are considered employees within provincial regulatory power while they reside in Canada, and they acquire the formal rights and obligations of domestic workers, including minimum employment standards, occupational health and safety standards, access to the labour relations regime, and workers compensation.³¹ But large gaps exist in practice between formal provincial regulation and the realities faced by these workers. In some provinces where foreign workers' situations have been studied in the greatest detail, flagrant abuses of statutory employment protections are evident on a broad scale. In Alberta, for example, 60% of restaurants employing foreign workers were found to be in contravention of that province's *Employment Standards Code*.³²

Many of the reasons behind these outcomes for foreign workers have been addressed in detail elsewhere. A main emphasis of recent scholarship has been to draw connections between individuals' status as temporary workers and their various employment-related insecurities. It has become increasingly clear that an employer's broad authority to effectively "repatriate" foreign workers skews the balance of power within employment relationships so far in the employer's favour that workers have nearly absolute disincentives to access even the minimum employment protections available to them. For example, foreign workers are highly unlikely to

people will continue to be employed in Canada on temporary status with no access to services and no possibility of family reunification; they will leave when their visas expire, requiring employers to recruit and train other temporary workers to replace them; or they will go underground and become undocumented workers vulnerable to abuse").

³¹ On the issue of federal responsibility to address these gaps, the House of Commons Standing Committee Report, *supra*, note at 38-39 had this to say:

Regulating includes setting standards and enforcing those standards. The federal government has no jurisdiction to enact laws in these areas (except in limited cases that are generally not applicable to temporary foreign workers.) However, the Committee believes that the federal government has a role to play in employer monitoring and compliance in the context of the temporary foreign worker program. The federal government established the program, authorized the employer to hire a foreign employee, approved various working conditions for the employee (such as wages), and authorized the employee to enter Canada and work for the employer.

Accordingly, we believe that the federal government has a continuing responsibility to ensure that the program is functioning properly.

³² *Byl, supra* note 3 at 2.

file employment standards claims, and since most provincial standards regimes are complaints-based systems, a lack of proactive monitoring and enforcement exacerbates existing power differentials between employers and employees, and effectively prevents temporary foreign workers from accessing the system altogether. Moreover, even where foreign workers intend to follow through on claims to vindicate their rights, they are normally back in their home countries before their cases can be adjudicated and as a result are cut off from effective remedies.

While undeniably valid, this emphasis on foreign workers' temporary status as a root cause of workers' employment-related insecurities reinforces the assumption that PNPs provide the best, or even an adequate means to address these problems over the long-term. A main purpose in evaluating the PNPs in Part IV, below, is to dispel this assumption to a certain extent, by focusing on the continuing power imbalances perpetuated by the nomination process in spite of the fact that workers formally enter a pathway to permanent residency designed to help them shed their temporary status.

2.2 Race and Gender Dimensions

The race and gender dimensions of TFWPs in Canada have been increasingly well documented. According to Judy Fudge and Fiona MacPhail:³³

Researchers who have examined the limited data concerning the source countries for the TFWP have remarked upon the racialized nature of the low-skilled part of the program. The proportion of temporary foreign workers from Asia and the Pacific has increased, while those from Europe and the United States have dropped. However, more than two-thirds of the temporary migrants in the managerial, professional, and skilled categories originated from Europe and the United States in 2005. By contrast, 59% of the workers from Asia and the Pacific

³³ Fudge and MacPhail, *supra* note 25 at 21, citing primarily Richard Trumper and Lloyd Wong, "Canada's Guest Workers: Racialized, Gendered, and Flexible" in Sean Hier and Singh Bolaria, eds., *Race and Racism in 21st Century Canada: Continuity, Complexity, and Change* (Toronto: University of Toronto Press, 2007) at 155-157. See also Ontario Federal of Labour and the Canadian Federation of Labour, "Submission to the Ministry of Labour Consultation on Foreign and Resident Employment Recruitment in Ontario", August 21, 2009 [OFL/CFL Submission] at 3 ("There is little doubt migrant workers are disproportionately racialized").

and 85% from the Americas (with the exception of the United States) have low-skilled positions.

Likewise, authors have pointed to the gendered nature of TFWPs, with a focus on programs for agriculture and live-in caregivers, and have emphasized the ways in which racialization, gender and temporary residency status intersect to produce specific forms of disadvantage for these workers.³⁴ A full exploration of these dimensions is beyond the scope of this paper, but an important lesson to draw from this research, which I return to in Part IV, below, is that because TFWPs are the direct antecedents to PNPs in all jurisdictions that admit lower-skilled workers, these same aspects of racialization and gender will inevitably carry over to the nominee programs and create key challenges in several areas of program design.

2.3 The Equality Rationale for Permanent Residency

While this paper emphasizes the real outcomes that lower-skilled foreign workers do and are likely to experience through the PNPs, it is easy to overlook the strong motivating rationale of worker equality behind much of this discussion. The principle of equality in this context is normally interpreted to mean that lower-skilled temporary workers should have the same opportunities to access the benefits of permanent immigration as higher-skilled temporary workers. As long as these skilled workers are afforded pathways to permanency, similar options should be extended to lower-skilled workers.³⁵ While higher-skilled workers might bring with them specialized knowledge, which is more valuable in wage terms on the labour market and for

³⁴ See Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37:2 *McGill Law Journal* 681 [Macklin] at 686 (referring to the "quadruple whammy" of class, gender, ethnicity, and citizenship). See also Kerry Prebisch and Luz Maria Hermoso Santamaria, "Engendering Labour Migration: The Case of Foreign Workers in Canadian Agriculture" in Evangelia Tastsoglou and Alexandra Z. Dobrowolsky, eds, *Women, Migration And Citizenship: Making Local, National and Transnational Connections* (London: Ashgate, 2006).

³⁵ House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parliament, 2nd Session, April 10, 2008 ("...authorities more readily grant permanent residence based on job qualifications, whereas it is not immediately [sic] granted for workers who occupy less skilled jobs. Discrimination based on social condition must absolutely be banished from these programs." Nicole Filion, Coordinator, League des Droit et Libertes).

which there is greater competition internationally, the permanent employment positions currently being filled by many lower-skilled foreign workers are equally necessary for Canada's economy to function successfully. Low-skilled workers also contribute in non-economic ways to societal development and community building. Allan Wise, a Settlement Facilitator in Manitoba, has explained that assessing access to permanent residency "in simple economic employment-oriented terms undermines the inherent value that our country has placed on the value of human capital. It should be recognized that mere technical expertise may enable the province's economy to grow in relative terms; however, it does not serve the more cohesive and overarching societal need, that is, to create a community."³⁶ Low-skilled workers are therefore equally deserving of the benefits that flow from their contributions to workplaces and communities. Permanent status affords a means for workers to capture the full scope of these entitlements, which are not fully realized in the wages and limited social-security benefits they receive while employed in Canada with temporary status.

With this underlying rationale in mind, and in light of existing challenges confronting temporary foreign workers, the next section attempts to map the legal and institutional structure of the PNPs in Canada. These programs vary widely between provinces, but this section draws out some of the general features of these programs relevant to their impact on lower-skilled foreign workers.

3. Overview of the Provincial Nominee Programs (PNPs)

Canada's immigration system admits permanent residents in one of three ways: as economic immigrants bringing capital and labour skills that contribute to economic growth and

³⁶House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 37th Parliament, 2nd Session, February 12, 2003 No. 028 37th (Allan Wise, Settlement Facilitator, International Centre - Citizenship Council of Manitoba).

community development, as sponsored family members for the purposes of family reunification, or as refugees on humanitarian grounds. The bulk of economic immigrants are higher-skilled workers who apply from outside of Canada and are assessed on a federally administered point system, business immigrants that include investors and entrepreneurs, and higher-skilled temporary workers and qualified international students already living in Canada who transition to permanent residency through the Canadian Experience Class.

PNPs represent a fourth pathway to permanent residency available to both higher and lower-skilled economic immigrants. These programs have developed in the context of an increasingly regionalized and decentralized immigration system in Canada, with the purposes of granting broader scope for provinces to tailor economic immigration in ways that meet their particular labour and overall economic development needs.

Provincial nominations for permanent residency in Canada emerged slowly in the late 1990s, but their popularity climbed steadily through the 2000s. Only 151 principle nominations were made in 1999, bringing a total of 477 immigrants, including spouses and dependents, to Canada through the PNP class in that year. By 2008, these numbers had climbed to 8,343 principle nominations and a total of PNP class 22,418 immigrants.³⁷ Manitoba led all other jurisdictions in PNP class immigrants in 2008, with 7,968 individuals – 34% of the Canadian total and more than double the number in British Columbia, the next most actively nominating province.³⁸

As Table 3.1 makes clear, the quantitative significance of provincial nominees as a source of economic immigration varies considerably between provinces. In Prince Edward Island, Manitoba, Saskatchewan, and New Brunswick, provincial nominees made up a relatively

³⁷ CIC, “Facts and Figures 2008”, *supra* note 15 at 6.

³⁸ *Ibid.*

large proportion (75% or more) of the total permanent economic immigrants in 2008. By comparison, nominees were a less significant source of economic immigration overall in Alberta and British Columbia, despite the fact that these are among the provinces making the highest number of nominations per year. These two provinces also bring in the highest numbers of temporary foreign workers annually.³⁹

Province	NL	PE	NS	NB	ON	MB	SK	AB	BC	YT
Provincial nominees*	107	1,258	866	1,038	1,097	7,968	3,037	3,323	3,629	28
Nominees as % permanent economic immigrants	35.8%	96.0%	47.4%	76.4%	2.9%	91.5%	82.3%	22.9%	12.7%	40.6%

Table 3.1: Provincial Nominees in 2008

*Principle applications plus dependents

Source: Citizenship and Immigration Canada, Annual Report (2009).⁴⁰

Note, however, that these proportions are not necessarily an accurate reflection of why and how provincial nominees are economically, socially and/or demographically significant for each province. No data are available from CIC, for example, on what percentage of these nominees are high and low-skilled workers, or whether they are concentrated in particular industries. For provinces such as Ontario that do not currently admit low-skilled workers through their PNPs, the available data reflect only high-skilled workers. In the latter case, it would be safe to assume that PNPs in these provinces still play a relatively minor role in economic immigration overall.

Federal-provincial agreements on immigration undergird the recent shift toward greater provincial control over economic immigration and create the legal supra-structure for the PNPs. All ten provinces and the Yukon Territory have negotiated bilateral framework agreements with

³⁹*Ibid.* at 62.

⁴⁰ CIC, "Annual Report to Parliament on Immigration, 2009" (2009), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/publications/annual-report2009/index.asp>> ["CIC Annual Report 2009"] at 22.

the federal government.⁴¹ The resulting PNPs form what amount to a series of decentralized channels through which private employers, via provincial governments, can access foreign labour and establish workers in long-term employment relationships as permanent residents. Some agreements also include provisions that may increase the flexibility of TFWPs to suit provincial purposes and provisions that delegate responsibilities for settlement services and immigrant protections to provincial governments and municipalities.

All of the federal-provincial agreements on immigration, not including the Canada-Quebec Accord, were signed or subsequently updated after the *IRPA* came into force in 2002.⁴² These agreements define the responsibilities of respective federal and provincial governments in relation to new immigrants, temporary residents and refugees, and establish the terms of cooperation in each area.⁴³ The earliest of the current agreements was signed in 1996 (Manitoba) and the most recent in 2008 (Prince Edward Island). Most of the framework agreements have an indefinite duration, with the exception of British Columbia and Ontario, whose agreements are scheduled to expire in 2010.⁴⁴

⁴¹ More accurate labels would therefore be “federal-provincial/territorial agreements” and “provincial and territorial immigrant nominee programs”. Since a main focus of this paper is not on the Yukon Territory’s programs, the territorial label is dropped for simplicity.

⁴²*IRPA*, *supra* note 2 at s. 8(1) (“The Minister, with the approval of the Governor in Council, may enter into an agreement with the government of any province for the purposes of this Act”) and s. 10(2) (“The Minister must consult with the governments of the provinces respecting the number of foreign nationals in each class who will become permanent residents each year, their distribution in Canada taking into account regional economic and demographic requirements, and the measures to be undertaken to facilitate their integration into Canadian society”).

The federal government’s accord with Quebec is not considered in detail in this paper. That accord, which was signed in 1991, provides for a provincial immigration scheme that gives Quebec much greater control over selecting immigrants to settle in the province compared to other agreements.

⁴³ See for example “Canada-Ontario Immigration Agreement” *Citizenship and Immigration Canada* (21 November 2005), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/EnGLIsh/departement/laws-policy/agreements/ontario/can-ont-index.asp>> [*Canada-Ontario Immigration Agreement*] at s. 3.2 (defining an objective of the agreement “to foster effective partnerships between Canada and Ontario for the recruitment, selection and admission of immigrants and temporary residents, as well as the settlement and integration of immigrants in Ontario”).

⁴⁴ “CIC Annual Report 2009”, *supra* note 40 at 21.

At the most general level, the federal-provincial framework agreements envision an allocation of immigration responsibilities along the following lines. The federal government retains primary control over setting national immigration policy by defining classes of admissibility and inadmissibility, and by ensuring that Canada meets its international obligations with respect to refugees.⁴⁵ The framework agreements then leave broad scope for provincial governments to shape decision-making processes and to directly select the individuals who will populate the provincial nominee class, with attention to social, economic, and demographic objectives defined by the provinces themselves. Notably, the federal government does not set a cap on the number of individuals nominated annually by the provinces, making room for the nominee class to become a very large box.⁴⁶ The bulk of each agreement then goes on to define the terms of cooperation between the parties, with annexes providing for specific programs such as the PNPs and settlement services. Many provincial nominees will be individuals who initially entered the country with a temporary work permit under one of the federal TFWPs. Successful provincial nominees are fast-tracked through the immigration process in a fraction of the time that it would take them to gain permanent residency status via other federal immigration streams and are subject to special admission criteria designed by the responsible provincial government.⁴⁷

An early incarnation of the current nominee programs was negotiated by Manitoba in the mid-1990s as a response to labour shortages plaguing the province's booming garment industry. At that time, public debates were ongoing between garment industry employers, who were pushing for greater flexibility to recruit foreign workers for permanent positions, mainly as

⁴⁵ See for example, "Canada-Manitoba Immigration Agreement" Citizenship and Immigration Canada (June 2003), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/department/laws-policy/agreements/manitoba/can-man-2003.asp>> [*Canada-Manitoba Immigration Agreement*] at Preamble.

⁴⁶ Alboim and Maytree, *supra*, note 10 at 5 and 34.

⁴⁷ *Ibid.* at 35.

sewing machine operators, and the Progressive Conservative provincial government of the day, which was generally in favour of preserving jobs for domestic labour. Eventually the garment industry employers won out.⁴⁸ In 1996, Manitoba struck a deal with the federal government to recruit 200 foreign garment workers to settle permanently in the province.⁴⁹ Most of the workers recruited under this agreement were female sewing machine operators from the Philippines. The terms of the agreement placed stringent requirements on employers, requiring them to sponsor foreign garment workers, in the absence of family sponsorship, for a period of ten years. Employer sponsorship included responsibilities to ensure that workers did not access unemployment insurance or social assistance.⁵⁰ The actual degree of oversight or enforcement of sponsorship responsibilities has been called into question, however, as no government reports addressing this aspect of the agreement have ever been publically filed.⁵¹

Despite the Manitoba program's early roots as a targeted labour migration scheme in lower-skilled sectors, recent trajectories suggest that its PNP has evolved as part of a much more broad-based regional immigration strategy.⁵² Some other provincial programs have developed along similar lines. New Brunswick, for example, implemented its PNP in 1999 as a mechanism to begin addressing long-term population decline, and to promote a more diverse population through immigration.⁵³ As a result, the province's early efforts through its PNP were largely directed toward higher-skilled economic immigrants and focused on attracting individuals to the

⁴⁸ Aaron Pettman, "Government Programs and the Garment Industry" in Raymond Wiest, ed., *The Winnipeg Garment Industry: Industry Development and Employment* (Winnipeg: Manitoba Research Alliance on Community Economic Development in the New Economy, 2005) at 23.

⁴⁹ Dan Lett, "Immigration Plan Gets Green Light" *Winnipeg Free Press* (Winnipeg: Thompson Canada Ltd.) 25 January 1996, Section B7.

⁵⁰ *Ibid.*

⁵¹ Audrey Macklin, "Public Entrance/Private Member" in Brenda Cossman and Judge Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 234.

⁵² See Part IV, below.

⁵³ Rosemary Clews, "Exploring and Overcoming Barriers to Immigration in New Brunswick" St. Andrews, New Brunswick (2004) online: <http://atlanticportal.hil.unb.ca:8000/archive/00000078/01/Clews_English.pdf> at 282.

main urban centres. Yet other provinces – British Columbia, Saskatchewan, and Alberta in particular – appear to view their PNPs as a much narrower policy tool, using these programs in conjunction with the TFWPs to fill targeted labour shortages without addressing larger employment and immigration contexts. Finally provinces with newer programs that admit relatively few nominees, such as Ontario, have yet to define an over-arching policy direction. The implications of these divergent provincial approaches for lower-skilled temporary foreign workers are discussed in detail below.

3.1.1 General Features Common to PNPs

At least two features common to contemporary PNPs in Canada and relevant to lower-skilled foreign workers are discernable. First, provincial autonomy to develop and administer nominee programs under the framework agreements is nearly unlimited. According to all PNP agreements signed to date, provincial governments hold exclusive authority to establish program criteria, nomination quotas, and administrative schemes, leaving the federal government with a limited role to monitor basic admissibility requirements under the *IRPA* and to negotiate evaluation processes for each provincial program. The language of the framework agreements indicates unequivocally that these programs are designed for the provinces to occupy maximum jurisdictional space. The Canada-Ontario Agreement, for example, recognizes that “Ontario is best positioned to determine the specific needs of the province vis-à-vis immigration.”⁵⁴ This and similar provisions represent a strong undercurrent pulling toward highly decentralized economic immigration programs.

At the level of program design, current PNP agreements enable the provinces to establish their own criteria for making nominations and to set target numbers for nominees from year to

⁵⁴“Canada-Ontario Immigration Agreement” Annex C, *supra* note 43 at s. 1.1.

year.⁵⁵ Most provinces have created distinct sub-categories or streams in their PNPs based on skill level, family status, or planned business development, and sometimes restrict these to specific industries and occupations. Provinces do not require approval from CIC when they create or implement new streams or when they make changes to existing ones.⁵⁶ The PNP agreements also call for the federal and provincial governments to negotiate evaluation plans for each provincial program, but so far negotiations in this area have not been forthcoming, leaving the provinces effectively unrestrained in developing and modifying their programs.⁵⁷

At the level of evaluating individual nomination applications, provincial governments, sometimes in partnership with employers and other non-governmental actors, are given the broad authority to make most, if not all, substantive determinations about eligibility. These parties process nominee applications and present a final nomination certificate to the CIC, which assesses basic individual admissibility requirements with respect to the health, criminality and security risk of the nominee.⁵⁸ Once the basic federal requirements are met, provincial nominees are normally approved and the necessary documents are issued by CIC to individual workers.

Notably, provinces may recommend that nominees be issued a temporary work permit, usually in the form of a permit renewal, without requiring an LMO. This process allows nominees to acquire a temporary work permit and continue working in the province while their application for permanent residency status is being processed. Some PNP agreements contain explicit language to recognize this power, but recent CIC Guidelines acknowledge the exemption for all provinces with PNP agreements in effect.⁵⁹ Provincial needs to exercise this authority are

⁵⁵ See for example, *ibid.* at ss. 4.2 - 4.4.

⁵⁶ Fraser, *supra* note 1 at 25.

⁵⁷ *Ibid.* at 25-26.

⁵⁸ See for example, "Canada-Ontario Immigration Agreement" Annex C, *supra* note 43 at s. 4.7(b).

⁵⁹ CIC, "Foreign Worker Manual" (November 10, 2009), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/manuals/fw/fw01-eng.pdf>> at 43. For those provinces whose PNP agreements contain explicit language referencing this power, the statutory authority is *IRPR*, *supra* note 23 at s.

also determined by the specific nomination requirements in place in each jurisdiction. All existing PNP streams for lower-skilled workers require nominees to first become temporary workers admitted into the province through one of the federal TFWP streams and to work under a temporary permit for a minimum time period before they are eligible to apply as a nominee (6 and 9 months are common). Other program streams for higher-skilled workers allow nominees to be recruited from outside Canada and to arrive directly without first applying through the TFWPs.⁶⁰

The reallocation of federal jurisdiction over immigration to the provinces has caused a growing divergence in the structure of nominee programs between provinces.⁶¹ As Naomi Alboim and Maytree foreground in their recent report on Canada's immigration system, the likely result of this trend is a fragmented policy landscape whereby provincial programs differ widely in their objectives and implementation strategies.⁶² While fragmentation poses a serious barrier to developing a coherent national immigration policy, it also threatens to severely erode the abilities of provincial and federal governments to coordinate a system of labour protections and services for vulnerable lower-skilled foreign workers. This issue is taken up in more detail below.

A second common feature of PNPs is that they, like the TFWPs, are essentially employer-driven and thus reflect strongly the interests and demands of influential private actors.

204(c). For all other provinces with PNP agreements, the same power is recognized pursuant to *IRPR*, *supra* note 23 at s. 205(a).

⁶⁰ See Alboim and Maytree, *supra*, note 10 at 35 (criticizing these variations as lacking clear justifications and as being unevaluated); *c.f.* Part IV, below.

⁶¹ Fraser, *supra* note 1 at 25 ("Provincial nominee programs have become highly diverse and complex over time, with selection criteria that vary substantially from one province to another. At the time of our audit, they included more than 50 different categories, each with its own selection approach and criteria. PNP agreements do not require provinces and territories to obtain CIC's approval when they create new PNP categories; they are required only to inform CIC"). See also "House of Commons Standing Committee Report on Temporary Foreign Workers", *supra* note 3 at 10.

⁶² Alboim and Maytree, *supra*, note 10.

Employers directly generate the demand for foreign workers, sometimes participate actively in developing specific PNPs, and invariably exert a high degree of practical control over nominee recruitment and selection processes.

In a national study of employer practices, the Conference Board of Canada has found that employers are frequently turning to a combination of PNPs and TFWPs to meet their labour market requirements.⁶³ For many of these employers, “it is increasingly difficult for them to attract and retain workers for certain positions due to growing skills and labour shortages, often tough and remote working conditions, and competition from other sectors.”⁶⁴ The potential for PNPs to provide access to permanent immigrants whose employment skills are specifically selected to meet these labour requirements is clearly attractive to businesses. PNP immigration processes also tend to be much faster compared to those at the federal level, closing the sometimes-lengthy gap in time between the point at which employers identify labour needs and the point when workers are actually available to fill these positions. PNPs may also allow employers to bypass the federal LMO requirements under certain conditions, which is significant since employers have expressed some frustrations with the time and resources they need to devote to fulfill these requirements.⁶⁵

But not all types of employers are equally likely to generate demand for provincial nominees. According to the Conference Board study, “[t]he PNP and the TFW Program are popular with some larger employers but often prove too costly for smaller ones to adopt.”⁶⁶ Large businesses can more easily afford the significant administrative costs that can attach to

⁶³Kurtis Kitagawa, Tim Krywulak and Douglas Watt, *Renewing Immigration: Towards a Convergence and Consolidation of Canada’s Immigration Policies and Systems* (2008) online: The Conference Board of Canada <<http://www.conferenceboard.ca/documents.aspx?did=2758>> [Kitagawa, Krywulak and Watt] at 22.

⁶⁴*Ibid.* at 34.

⁶⁵*Ibid.*

⁶⁶*Ibid.* at 26.

recruiting, transporting, re-settling, and training nominees, such that the demands of these enterprises are most likely to dominate nominee programs. In a recent example, Maple Leaf Foods spent an estimated \$7,000 per worker to employ individuals in their Brandon, Manitoba processing plant, bringing them to Canada initially through a TFWP and subsequently nominating them for permanent residency through the Manitoba PNP.⁶⁷

Notably, the federal-provincial agreements on immigration with Ontario and Alberta contain annexes that provide provincial governments and employers with greater flexibility in assessing labour market needs, without requiring input from HRSDC in the form of an LMO.⁶⁸ The Ontario and Alberta annexes explicitly recognize that pursuant to s. 204(c) of the *IRPR*, CIC is authorized to issue a temporary work permit without requiring a prospective employer to seek an LMO if requested to do so by the province.⁶⁹ Under these sub-agreements, Ontario and Alberta agree to establish procedures and criteria to govern this authority, and to provide annual estimates of the number of temporary work permits issued by this route.⁷⁰

⁶⁷"Hog Workers Approve Contract That Aids Foreign Workers" *CBC News Online* (5 January 2010), online: CBC News Online <<http://www.cbc.ca/canada/manitoba/story/2010/01/05/mb-foreign-workers-contract-maple-leaf-manitoba.html>> [CBC, "Hog Workers Contract"].

⁶⁸"Canada-Ontario Immigration Agreement" *Citizenship and Immigration Canada* (21 November 2005), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/EnGLish/departement/laws-policy/agreements/ontario/can-ont-index.asp>> Annex G: Temporary Foreign Workers (2008) ["Canada-Ontario Immigration Agreement"]; "Agreement for Canada-Alberta Cooperation on Immigration Annex B: Temporary Foreign Workers" *Citizenship and Immigration Canada* (2008), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/departement/laws-policy/agreements/alberta/can-alberta-annex_B-2008.asp>.

⁶⁹*IRPR*, *supra* note 23 ("A work permit may be issued under section 200 to a foreign national who intends to perform work pursuant to ... (c) an agreement entered into by the Minister with a province or group of provinces under subsection 8(1) of the Act" at s. 204).

⁷⁰"Canada-Ontario Immigration Agreement Annex G", *supra* note 68 at ss. 3.5, 3.7; "Canada-Alberta Agreement Annex B", *supra* note 68 at ss. 4.3.3, 4.4.

It remains uncertain whether and how governments in Ontario and Alberta are utilizing these powers to streamline the temporary work permit process for foreign workers. Ontario's agreement provides that its authority must be exercised to "promote economic development opportunities" in the province, "such as securing significant business or industrial investments, encouraging business competitiveness and productivity, advancing scientific research and development, and encouraging the commercialization of research." This language signals an emphasis on high-skilled workers, researchers and business entrepreneurs. By comparison, Alberta's authority appears somewhat broader and may also encompass low-skilled workers. It may be exercised whenever a temporary foreign worker will "contribute significantly to Alberta's economic development goals." See "Canada-Ontario Immigration Agreement Annex G", *ibid.*, at ss. 3.3; "Canada-Alberta Agreement Annex B", *ibid.*, at ss. 4.3.1.

The practical control that employers exert over nominee recruitment, selection and settlement processes is probably the most striking feature of the PNPs. Employers act as *de facto* principals for provincial nominees, selecting workers for nomination directly – sometimes through foreign recruiters as part of the TFWPs – and providing support and settlement services for them in Canada. For low-skilled employment positions, nominees are required in all PNPs to have worked for their nominating employer for a minimum period and to have obtained a permanent, long-term job offer prior to applying for nomination. Low-skilled employers too are often required to undertake specific responsibilities that heighten their level of involvement in many significant aspects of workers’ lives. These include facilitating the search for housing and providing for English or French language classes in cases where workers are not proficient in one of these languages.

A few critics of the TFWPs and PNPs in Canada have pointed out the overriding problem of employer control both in the policy-setting realm and in the actual workplace. Their criticisms raise concerns about effects on national immigration policy, on labour protection policies, on the realization of actual protections for vulnerable workers, or as some combination of these. In respect of immigration policy, “[s]ome argue that letting employers choose who enters is against all the principles that have shaped Canada as an immigration country.”⁷¹ These comments reflect deep-seated concerns about vesting private actors with core responsibilities for nation building.⁷² Alternatively, Alboim and Maytree target the devolution of decision-making and program development from the federal government to the provinces and private interests, resulting in

⁷¹Dominique Gross, “Temporary Foreign Workers in Crisis: Should They Stay, or Go?” *The Globe and Mail* (Toronto: 30 April, 2009).

⁷² House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parliament, 2nd Session, 9 April 2008, 39th (Jenna Hennebry, “With respect to the private interests that I see driving policy here, I was just at the Metropolis Conference in Halifax. It was contended there that the farm worker program is not expanding, it is employer-driven. This is what keeps being said. What concerns me is that this means there's no cap on foreign workers, and it means we have an employer-driven immigration system, putting nation building in the hands of the private sector--not to mention the role of the third party recruiters in this process.”) [Hennebry Evidence].

fragmentation of immigration priorities and procedures.⁷³ Others have focused specifically on the fact the PNPs bind foreign workers closely to employers, exacerbating rather than relieving some of the real insecurities that figure prominently in the TFWPs.⁷⁴

Some proponents of existing PNP models have countered that the problems associated with employer control over economic immigration are overstated and maintain that market-based incentives will effectively penalize abusive employers. These parties believe that economic immigrants will be attracted to responsible employers, such that employers will have adequate incentives to place voluntary restraints on formal and informal bargaining power.⁷⁵ But this argument rests on the dubious assumption that information about employer practices is readily available and that it will be accessible by temporary foreign workers – who, as discussed below, face significant barriers related to language, education, cultural, and access to support services. Without this information, so-called “reputation effects” are unlikely to place serious restraints on employers’ actions. Overall, it is generally clear that implicit standards of self-regulation fall well below what is necessary to protect workers, particularly in light of the broad employer discretion now inherent in existing PNP models. The main questions, taken up in the following section, are about what aspects of nominee program design premised on this discretion actually contribute to workers’ insecurities and about whether responses by governments and third-party actors can be considered sufficient to meet the resulting concerns.

⁷³ Alboim and Maytree, *supra* note 10.

⁷⁴ See Byl, *supra* note 3 (“A key feature of PNPs is that they are employer driven. The employer starts the process and recommends foreign workers for the program. their role of pre-selection shapes significantly the makeup of workers accepted into the program. It also creates an impression among workers that they are beholden to the employer, even though once in the PNP stream, the worker has few specific obligations to the sponsoring employer. The Advocate has heard reports of unhappy employers threatening to withdraw workers from the PNP” at 17).

⁷⁵ House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parliament, 2nd Session, No. 22 3 April 2008, (Evidence of Kenneth Zaifman, Zaifman Immigration Lawyers, “In some cases, we may even be prepared to off-load that responsibility in its entirety to responsible corporations, in the sense that if they're responsible for the selection, for the hiring, for the recruitment, for the process, it might then address the abuses on the fringe of the program. Because immigrants who come to Canada are no different from Canadians: they will gravitate to responsible employers if they can meet the requirements, and many of them can.”)

4. Evaluating the Nominee Programs: Institutional Design and Practice

There is no doubt that PNPs, as pathways to permanent residency, ultimately remove employers' *de facto* ability to "repatriate" workers on temporary permits, thereby dispelling a key element of the power imbalance between employers and workers that generates some of the resulting insecurities discussed in Part II, above. However, this asymmetry in bargaining power is deflected back into the employment relationship by design of the nominee programs (or failures thereof) in at least four different ways. First, employers' exclusive controls over nominee recruitment and sponsorship ratchets up the pressures on temporary workers before they receive nominee status. The possibility of permanent residency, without further restraints on employer discretion or a wholesale shift away from using the TFWPs as a gateway to the nominee programs, may ultimately exacerbate rather than diminish the level of coercion and resulting abuses already experienced by temporary foreign workers. Second, the institutional complexity resulting from the division of PNPs into sector-specific streams and provinces' ability to change these programs at will favours employers and disadvantages foreign workers, who are already hindered by language barriers and access to information challenges. Third, the devolution of settlement and language training to employers makes them responsible for key elements in workers' social and economic lives, tethers them even more closely to specific employers, and skews the distribution of the kinds of employers who are available to meet these needs. Finally, nominee programs across Canada invariably fail to address the gendered and racialized dimensions now inherent in temporary worker programs. Since the TFWPs serve as the sole gateway for lower-skilled provincial nominees, these dimensions of race and gender will inevitably carry over into the nominee processes unless provinces proactively address associated

problems and challenges experienced by these workers. It is striking that policy makers have done nothing to address these realities in designing their respective PNPs.

This section elaborates on each of these four concerns in relationship to the specific design features of existing PNPs in Canada. To make the discussion concrete, I focus on PNP case studies in Alberta and Manitoba – two provinces that provide opportunities for employers to nominate lower-skilled workers. The Alberta Immigrant Nominee Program (AINP) closely resembles similar programs in British Columbia and Saskatchewan with respect to their sector-specific program streams, nomination procedures, and requirements for language and settlement service provision. Alberta's increasing reliance on the federal TFWPs has been strongly criticized by the labour movement and others in the province for failing to protect vulnerable temporary workers, and despite the AINP's growing accessibility to lower-skilled workers it appears to replicate many of the TFWP's problems. Manitoba's nominee program (MPNP), by contrast, is often held out as a successful program model. It offers the most general, and probably the most easily accessible, program streams for lower-skilled workers in comparison to other provinces. And while it is strongly employer directed, the MPNP has promoted broad involvement of municipal governments and organized labour, at least among the few larger corporations that participate heavily in the program. In an approach distinctly different from that of Alberta, Manitoba has used its nominee program to functionally reshape the TFWP into a tool for permanent immigration rather than use it as a stopgap measure to address short-term labour shortages. While outcomes for individuals appear to be significantly improved under the MPNP compared to other provinces that admit lower-skilled workers, Manitoba's innovations have been at best partially successful in meeting the challenges posed by the employer-driven nominee model adopted by all provinces to date.

4.1 Background to the Case Studies

Manitoba's nominee program has evolved in response to a confluence of demographic and labour market pressures. At least two major demographic factors have driven its development.⁷⁶ The first is Manitoba's relatively slow population growth in comparison to national trends. The province's population grew by only 3% over the past decade to 2006, in comparison to 9.6% for the country as a whole.⁷⁷ As a result, it has been a priority for Manitoba to increase immigration but it continues to do so in competition with major immigration centres in Vancouver, Toronto, and Montreal. A second factor is the dramatic concentration of new immigration in Winnipeg, the province's major urban centre. Winnipeg currently accounts for 60-70% of the province's total population, and has received 80% of new arrivals to Manitoba since 1996.⁷⁸ The MPNP was therefore developed with a strong motivation toward diversifying immigration in the province to promote a more geographically balanced population growth. Key labour market shortages have also been a motivating force being the MPNP's development, from the shortage of garment industry workers that initiated the precursor to the MPNP in the mid-1990's to more recent labour shortages in manufacturing, food processing, and transportation sectors.

While the number of temporary foreign workers coming to Manitoba increased from 2,794 workers in 1999 to 4,192 in 2008, this increase is significantly lower than national trends, which saw a 80% increase in the number of temporary foreign workers overall during the same

⁷⁶T. Carter, M. Morrish and B. Amoyaw, "Attracting immigrants to smaller urban and rural communities: lessons learned from the Manitoba Provincial Nominee Program" (2008) 9 *Journal of International Migration and Integration* 161 [Carter, Morrish and Amoyaw] at 167-168.

⁷⁷ Statistics Canada, "Population and Dwelling Counts – 2006 Census" online: Statistic Canada <<http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-550/Index.cfm?TPL=PIC&Page=RETR&LANG=Eng&T=101>>

⁷⁸ Carter, Morrish and Amoyaw, *supra* note 76 at 167.

time period.⁷⁹ At the end of 2008, there were 5,357 temporary foreign workers residing in Manitoba.⁸⁰ Between 2000 and 2008, the number of provincial nominees in Manitoba increased steadily from just over 1,000 to 7,968 nominees.⁸¹

Alberta's nominee program was developed much more recently and under significantly different demographic and labour market conditions compared to the MPNP. Trends in Alberta have been heavily influenced by rapid growth in the oil and gas industries since the mid-2000s. High demand for workers in these sectors has had a dramatic impact on most, if not all, other sectors of the Alberta economy, leading to labour shortages and a host of other challenges.⁸² In response, the Alberta government undertook a major promotion of the TFWPs to employers.⁸³

3,323 individuals were nominated through the Alberta program in 2008. While this is a significant number of immigrants, it represents only a small percentage (5.8%) of the 57,707 temporary foreign workers in Alberta at the end of the same year.⁸⁴ Alberta's situation more closely reflects that of Canada as a whole. While there were 251,235 temporary foreign workers in Canada at the end of 2008, there were only 22,418 provincial nominations in total, representing 8.9% of the total foreign workers. Development and expansion of the AINP has also been much less consistent than that of the Manitoba program, with slow growth in the early years of the AINP since 2002 and more rapid increases in the number of nominations since 2006. This

⁷⁹ CIC, "Facts and Figures 2008", *supra* note 15 at 49.

⁸⁰ *Ibid.* at 64.

⁸¹ Manitoba Labour and Immigration, "Manitoba Immigration Facts: 2008 Statistical Report" (Winnipeg: 2009) online: Manitoba Labour and Immigration <http://www2.immigratemanitoba.com/asset_library/en/resources/pdf/mif08.pdf> at 9 (including principles, spouses and dependents).

⁸² T. M. Derwing and H Krahn, "Attracting and retaining immigrants outside the metropolis: is the pie too small for everyone to have a piece? The case of Edmonton, Alberta" (2008) 9 *Journal of International Migration and Integration* 185 at 187.

⁸³ *Ibid.*

⁸⁴ CIC, "Facts and Figures 2008", *supra* note 15.

growth in the AINP closely tracks the skyrocketing number of temporary foreign workers admitted to Alberta during the same time period, albeit with less dramatic increases.

4.2 Recruitment and Selection Processes Increase Opportunities for Abuse

Since lower-skilled foreign workers must first apply to work in Canada through one of the TFWPs before they are eligible to become nominees under both the Alberta and Manitoba programs, the mere availability of nominee programs does little to address the current problems that all foreign workers face with respect to recruitment. In fact, the possibility that temporary workers might be able to attain permanent residency at some point in the future is likely to exacerbate existing insecurities by raising the stakes for workers. This generates greater bargaining power for employers and provides increased leverage for unscrupulous recruiters to exploit workers.

At foreign workers' point of entry into Canada, recruiters are now playing a prominent role. Recruiters and recruitment agencies offer a number of services to employers, which include locating available workers in their home countries; assessing the qualifications of potential workers, verifying references, assisting in resume preparation, arranging interviewing, and negotiating the employment contract. Recruiters may also assist workers in gathering required documents, provide information about legal rights and obligations, make travel arrangements, and assist with arrival and settlement.⁸⁵ But workers have been subjected to widespread abuses at the hands of some of these agencies. Taking advantage of individuals with limited access to information, unscrupulous recruiters charge unreasonable fees to workers, manufacture fake offers of employment, fail to provide adequate information about legal rights or provide

⁸⁵ Canadian Association of Professional Immigration Consultants (CAPIC), "Temporary Foreign Worker Program: Ontario Regulation of Recruiters" Policy Paper (18 September 2009). Online. Available at <<http://www.capic.ca/policy%20papers/TFWP%20Regulation.pdf>> [CAPIC] at 5 - 6.

misinformation, and renege on offers to provide settlement services and assistance.⁸⁶ Despite these risks, lower-skilled foreign workers generally have few other options if they want to secure employment and prospects for permanent residency in Canada.

It is increasingly clear that foreign workers are coming to Canada through temporary permits with exactly this type of expectation. As one worker advocate in Alberta has noted, “of the hundreds and hundreds of temporary foreign workers I have dealt with over the last two years, almost all have come here not to work temporarily but to immigrate to this country. Because our immigration system is so dysfunctional...the only way they can come here is as temporary foreign workers.”⁸⁷ However, it is worth noting that these same worker expectations have been a basis for demands to expand nominee programs to admit greater numbers of lower-skilled workers.⁸⁸ In spite of the federal government’s persistent claims that temporary foreign workers should clearly understand their employment relationships as time-limited positions, advocates argue, many workers have occupied functionally long-term positions under a series of renewable work permits. The problem for workers is that as long as TFWPs serve as the only “gateway” to permanent residency, the availability of nominee programs to satisfy their expectations –without other legally enforceable protections – largely serves to exacerbate existing insecurities.⁸⁹

⁸⁶ *Ibid.*

⁸⁷ House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parliament, 2nd Session, 1 April 2008. HCSCCI (Evidence of Yessy Byl, Alberta Federation of Labour Temporary Foreign Worker Advocate).

⁸⁸ See for example Byl, *supra* note 3 (“Only 4% of foreign workers are accepted into the program, even though the bulk of foreign workers come with the expectation and hope of permanent settlement, which was deliberately fostered by brokers and the government” at 2).

⁸⁹ The experience of live-in caregivers in Canada is apostate. Currently, Ontario regulates recruitment activities for live-in caregivers but has declined to extend similar protections to other foreign workers. The *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, S.O. 2009, c. 32 [EPFNA], which came into force in March 2010, prevents recruiters from charging fees to caregivers and prohibits employers from recovering recruitment costs from workers. Recruiters and employers can no longer seize caregivers’ passports and identity documents – often used as means of exerting control – and are prohibited from penalizing individuals from inquiring about or asserting their rights. There have been no indications to date, however, that the Ontario government plans to

Manitoba has gone some way toward protecting foreign workers against recruiter abuses. In April 2009, Manitoba became the first province to regulate recruiters through its *Worker Recruitment and Protection Act*.⁹⁰ The *Act* prohibits recruiters from receiving or collecting fees directly or indirectly from workers they assist in finding employment, currently one of the main abuses common among these agencies. Exorbitant fees charged to workers can dramatically reduce their net earnings from employment. The Manitoba legislation also creates a registration process whereby recruiters must first register with the province before they are permitted to apply to HRSDC for LMOs. Finally, the new *Act* contains improved enforcement provisions to oversee the regulatory process.

But while ancillary legislation protections such as this one may protect potential nominees against some recruiter abuses, PNP selection processes themselves are likely to increase opportunities for employers to exploit workers directly. Alberta's "semi-skilled" nominee stream for lower-skilled workers – a hodgepodge of narrow, sector-specific pathways – currently makes temporary foreign workers in the food and beverage processing, hotel and lodging, manufacturing, trucking, and foodservice sectors eligible for nomination.⁹¹ Employers and workers in these sectors follow a relatively complex application process.⁹² First, employers specify the number of nominations they intend to make, and outline the job description and requirements, settlement and retention plans, and any sector-specific requirements to the provincial government. This process allocates a specific number of nominations to each

include other temporary foreign workers, who are also vulnerable to recruiter abuses, under this new scheme of protections.

⁹⁰S.M., 2008, c. 23 [WRPA].

⁹¹ Government of Alberta, "Alberta Immigrant Nominee Program (AINP)" (2010) online: Alberta <<http://www.alberta-canada.com/immigration/immigrate/ainp.html>> [AINP Website].

⁹² Government of Alberta, "Employer-Driven Application - Semi-Skilled Worker Category (AINP 001)" (May 2009) online: Alberta Employment and Immigration <http://www.alberta-canada.com/immigration/media/IA-AINP_ainp001.pdf>.

employer directly, limiting the maximum number of nominations according to sector.⁹³ Once allocations are made, employers are eligible to select foreign workers who meet the basic education and worker experience requirements for nomination.⁹⁴ In Alberta, lower-skilled foreign workers must be employed with the nominating employer for a minimum period of six months before they are eligible for nomination. Other requirements for education and experience in workers' home countries vary across sectors. After nominated workers have been approved as nominees by the province, they apply CIC for permanent residency status.⁹⁵

The process of allocating nominations to employers before they select individual nominees disadvantages workers in at least two ways. First, it further discourages workers from accessing existing employment protections such as minimum employment standards in the face of employer abuses, by giving employers sole discretion to “reward” workers with nominations. Given that these nominations represent a direct path to permanent residence status in Canada, they are obviously extremely valuable to workers. As Yessy Byl, the Alberta Federation of Labour’s Temporary Foreign Worker Advocate, points out, some employers “use this program as a further excuse to exploit workers who desperately want to immigrate. Many dangle the possibility of nomination in the AINP to ensure acquiescence to unreasonable requests such as unpaid work, additional work, etc.”⁹⁶ Second, by limiting the number of allocations made to each employer, this system is likely to increase competition among workers for nominations and

⁹³ Nominations for front desk agents in the hospitality industry, for example, are limited to one per property location per year.

⁹⁴ Note that it is possible for employers to submit nominations for individual workers concurrently with their application for nominee allocations from the province.

⁹⁵ Nominee program streams for higher-skilled workers tend to operate much differently than low-skilled streams. Employers are generally able to nominate high-skilled workers who do not have previous work experience in Canada, but possess the desired education and training. These workers might be recruited and nominated directly in their home countries, entering Canada only once they have successfully acquired permanent residency status through the nominee process. TFWPs may still play a role for these nominees – for those who come to Canada initially through one of the high-skilled TFWP streams, for example – but the lack of a necessary link between TFWPs and PNPs for high-skilled workers is a primary reason why the PNPs may generate significantly different employment-related outcomes for those in the higher and lower-skilled groups.

⁹⁶ Byl, *supra* note 3 at 18.

may even discourage employers from participating in the nominee program altogether because they regard it as arbitrary and unfair.⁹⁷

Manitoba's nominee program offers some improvements over the AINP but still reserves to employers a disproportionate level of control over the selection process. The MPNP provides a general employer-driven nominee stream open to both high and lower-skilled workers in all occupations.⁹⁸ Employers nominate individuals directly and there is no system of sector-specific caps or nomination allocations prior to the selection process. The only substantial requirements under this program are that workers be employed full-time in Manitoba, that they have been working for the same employer for at least six-months, and that they receive an offer of long-term, full-time employment from that employer. Any training, certification, and work-experience requirements are determined by the specific job – that is, they do not differ from the requirements faced by domestic workers.⁹⁹

An additional innovation is that the MPNP requires employers to notify temporary foreign workers, within their initial six months of work, that the employer intends to nominate them through the MPNP. This requirement has the advantage of minimizing worker uncertainty about their future status while they are still ineligible for nomination under provincial requirements. On the other hand, it is difficult to see how the notification requirement holds much practical significance either for employers or workers, given that employers are always

⁹⁷ *Ibid.* (“Most employers respond to this limitation by refusing to participate because they feel they cannot simply choose one person when they often have ten or more temporary foreign workers employed at their restaurant” at 18).

⁹⁸ Government of Manitoba, “Manitoba Provincial Nominee Program” (2010) online: Manitoba <<http://www2.immigratemanitoba.com/browse/howtoimmigrate/pnp/pnp-general.html>> [MPNP Website]. Manitoba's PNP contains four priority assessment streams and one general nominee category. The four priority streams are Employer Direct, International Student, Family Support, and Strategic Initiatives, the latter stream being a small discretionary program with undefined criteria.

⁹⁹ Additionally, some minimum settlement funds may be required by the province to demonstrate workers' ability to settle permanently, however this requirement appears to be flexible based on the income of individuals workers.

free to change their mind by laying off workers altogether, resulting in the likely termination of their temporary work permit.¹⁰⁰

These critiques suggest that a further reform might be for the province to remove the six-month work requirement, making foreign workers eligible for nomination as soon as they begin work in Canada. This would at least provide the opportunity to do away with the temporary “trial period”, during which workers are arguably most vulnerable. Such a reform, however, may also serve to increase employer control ever further and calls into question the overall legitimacy of a program that gives private actors such broad scope to nominate immigrants without even basic requirements to prove their *bona fides*. Realistically, these challenges point to the inherent inadequacy of the TFWPs as an entry point for permanent economic immigration through an employer-driven nominee program. Palliative reforms that fail to recognize underlying problems of regulatory devolution and resulting institutional mismatch are unlikely to generate the kinds of outcomes for vulnerable foreign workers that fairness *and* sound economic policy-making are likely to demand.

4.3 Program Complexity and Instability Increase Workers’ Uncertainty

Employers’ wide discretion in the recruitment and nomination process is clearly one source of uncertainty likely to perpetuate workers’ vulnerabilities, generating high risks for individuals who attempt to enforce their rights. Another cause of uncertainty is the institutional complexity and instability of the nominee programs themselves, such that workers, and to some extent employers, are unable to form reliable expectations about eligibility requirements or about the ongoing availability of whole program streams. The reality, however, is that workers will

¹⁰⁰ Byl’s experience in Alberta suggests that the provincial government has a standing policy to revoke a nomination if the nominated worker is laid off at any point prior to attaining permanent residency status through CIC, see Byl, *supra* note 3 at 18.

inevitably bear a disproportionate share of the risk that they are, or will become, ineligible for permanent residency status. Whereas lower-skilled workers face major social and economic decisions about seeking work in Canada, about bringing their families, and about applying to work in specific occupations that may all turn crucially on the availability of a clear pathway to permanency, employers invest relatively little in bringing a foreign worker to Canada and retain wide flexibility to hire new workers should program requirements change.¹⁰¹

This issue has become a particular challenge for workers in Alberta. Constituted as a collection of sector-specific streams whose criteria for both workers and employers change frequently, the “semi-skilled” class of the AINP generates a high degree of uncertainty for all parties. For example, work experience requirements between streams differ widely. Eligible nominees in the food and beverage processing and foodservice industries must have a minimum of three years full-time work experience in their home country prior to arriving in Canada; for nominees in manufacturing, this requirement is four years and in the trucking industry nominees are only required to have previously “driven in a professional capacity”. Nominees in the hospitality sector are not required to have any prior experience, but do need to obtain professional certification or an equivalent.¹⁰² Many of these requirements continue to be fluid and have changed over time, increasing the inherent complexity of the system.

It is possible that some of this instability is the necessary product of legitimate experimentation by the province as it field-tests different options and attempts to adapt in the face of changing labour market conditions. But it is equally likely that at least some uncertainty is built in all nominee programs by the open-ended structure of the federal-provincial immigration agreements and by a lack of coordination between the provinces and the federal

¹⁰¹Employers do of course bear some share of the cost, see CBC, “Hog Workers Contract”, *supra* note 67.

¹⁰² AINP Website, *supra* note 91.

government on mechanisms for evaluation. These framework agreements and subsequent practice not only leave the provinces free to set their own agendas and to implement program streams accordingly, they largely discharge provincial governments from any real accountability for the consequences of reforms. By definition, foreign workers are formally excluded from most means of public participation and are often practically cut off from mechanisms to have their voices heard, such as organized labour regimes and other modes of collective action.

Foreign workers' well-recognized barriers to accessing information about their rights and entitlements of further compound these uncertainties. According to the House of Commons Standing Committee on Citizenship and Immigration:¹⁰³

Many of the abuses and difficulties that temporary foreign workers experience stem from their ignorance of the laws and regulations in place at different levels of government. Testimony before the Committee suggested that workers may be unaware because they were never informed, because they were informed in a language they did not understand, or because they were intentionally misinformed.

Temporary foreign workers may also lack basic access to means of communication, such as telephones and internet connections, and are unlikely to have the ability to access advice or legal counsel while in Canada. There is currently heavily reliance on employers and recruiters to provide workers with information about their rights, which can exacerbate existing problems of coercion and control over workers.

4.4 Employer Responsibilities for Service Provision Increases Risks for Workers

A third criticism of nominee program design is that the provinces have failed to contemplate the specific settlement services that these workers require, both during their period of transition (i.e. while they are still nominees) and over the longer-term, after they attain permanent residency. One of the major gaps left by failures of federal-provincial coordination

¹⁰³ House of Commons Standing Committee Report on Temporary Foreign Workers, *supra*, note 3 at 27.

over the PNPs is that during the period between when workers are nominated as provincial nominees and when they receive permanent residency status they are unable to access important settlement services, despite the fact that they are actively working to establish a permanent life in Canada. In particular, key programs funded through the federal Immigrant Settlement and Adaptation Program (ISAP) and other language training services are unavailable to provincial nominees until they formally acquire their permanent residency status.¹⁰⁴

Again, the provinces have placed heavy reliance on employers to fill in the gaps left by an absence of public regulation and service provision. There are two specific criticisms directed at this aspect of regulatory devolution. One is that obliging employers to provide essential settlement services further skews bargaining power to the disadvantage of workers by enmeshing their personal and family lives even more closely with authoritative decision-making processes undertaken by their employers. Jenna Hennebry has pointed out that:

[W]ith respect to status transitioning, using the provincial nominee program in conjunction with the temporary foreign worker program is good on the one hand, because it's a channel for permanent status and it allows workers to get a regular status and get access to settlement services... However, this still is binding migrants to employers, so I'd be hesitant to use that as the only avenue for permanent residency for that group.¹⁰⁵

While employers' participation in this area can have positive outcomes such as increasing employer-worker communication, building mutual respect, and strengthening norms of loyalty and reciprocity that promote worker retention, their activities are also seriously suspect in light of concerns about worker exploitation discussed above. A second worry is that when employers refuse to participate in service provisions or make bad faith attempts to fulfill formal requirements without actually supporting workers, these vulnerable individuals will find

¹⁰⁴ Johansen Evidence, *supra* note 8. See CIC, "Evaluation of the Immigrant Settlement and Adaptation Program" (2009) online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/evaluation/isap/intro.asp>>.

¹⁰⁵ Hennebry Evidence, *supra* note 72.

themselves in the vacuum left by an absence of public involvement. Likewise, while third-party actors such as organized labour provide crucial settlement supports and act as a counter-balance to employers' interests in some workplaces, governments' reliance on these actors implies that in non-unionized settings workers will be left without any substantial assistance.

Most lower-skilled nominee streams require employers to provide at least some form of language training and settlement services for nominees. Alberta's nominee program requires employers to provide workers with in-house language training services or to arrange for provision by a third party. Likewise, the AINP obligates employers in most streams to design an accommodation and settlement plan for nominees that "demonstrate employer support and assistance toward successful integration of the workforce, community and society integration."¹⁰⁶ While these seemingly modest requirements may appear to be positive developments in the direction of improving workers' security and likelihood of successful settlement, the implied trend is clearly toward the devolution of support services away from the provincial government and toward private actors, the effects of which remain largely unevaluated.

Employers in Manitoba, for example, have been active both in lobbying for an expanded nominee program and in developing surrounding institutions and services. Maple Leaf Foods – a large, multi-national food-processing and agribusiness company – has been a particularly strong proponent of the MPNP. Soon after Maple Leaf Foods opened its major pork processing plant in Brandon, Manitoba in 1999 it became apparent that local labour shortages would require the company to seek other recruitment strategies and it turned to temporary foreign labour in the

¹⁰⁶AINP Website, *supra* note 91.

early 2000s.¹⁰⁷ By April 2008, the company was employing over 1,200 lower-skilled temporary foreign workers¹⁰⁸ with plans to nominate most of these for permanent status through the MPNP. Unique features of Maple Leaf Food's involvement in development of the MPNP include not only its high nomination and retention rate of foreign workers, but also its collaboration with organized labour and the City of Brandon on labour protections and settlement services. These actors have developed a network of services for foreign workers that have been widely hailed as successful innovations – at least in those workplaces and urban environments where workers are able to take advantage of them. Part V, below, discusses some of the benefits and potential pitfalls of relying on third parties in these ways.

4.5 Program Design Fails to Address Dimensions of Race and Gender

There is no evidence to suggest that provincial jurisdictions who are opening their nominee programs to lower-skilled workers are seriously considering the heightened vulnerabilities experienced by foreign workers on the basis of gender and racialization. These oversights continue, despite the persistent attention being drawn to these dimensions of inequality in the context of TFWPs.¹⁰⁹ It is worth underscoring the reality that because federal TFWPs provide the sole source of lower-skilled provincial nominees under current program designs, these socially-produced features of foreign worker programs will inhere directly in the relevant PNP streams. Moreover, there is no reason to believe that employers will deviate from the same criteria for selecting provincial nominees as they use for selecting temporary workers in the first place. Preconceived stereotypes about the social gender roles lead employers to choose

¹⁰⁷ Jill Bucklaschuk, "An Overview of Temporary Foreign Workers in Brandon, Manitoba" Brandon University Rural Development Institute Discussion Paper (2008).

¹⁰⁸ House of Commons Standing Committee on Citizenship and Immigration, *Evidence*, 39th Parliament, 2nd Session, No. 22, 3 April 2008 HCSCCI (Evidence of Rory McAlpine, VP Government and Industry Relations, Maple Leaf Foods).

¹⁰⁹ See Macklin, *supra* note 34.

women and men for specific jobs. Likewise, employer beliefs that individuals from certain countries of origin are better able to perform this or that job create racialized profiles within particular sectors and industries. Left to the sole discretion of employers, the effects of nominee selection processes in this area will likely be to ossify and entrench aspects of race and gender discrimination as part of Canada's economic immigration system.

5. The Role of Organized Labour

One response to the risk that PNPs, by design, exacerbate or perpetuate insecurities for temporary foreign workers is that third parties such as organized labour and municipal governments, when they participate, can be key actors in helping to counter-balance employer power. These actors may also contribute to service provision for workers during the nominee process and after they become permanent residents. This section explores organized labour's role in Manitoba, where unions have been particularly active, and discusses some of the main advantages and disadvantages of this approach to regulating and supplementing the PNPs.

Beginning in the early stages of the MPNP, organized labour has played a prominent role in negotiating collective agreements that protect foreign workers and put positive pressure on employers to nominate workers for permanent residency. The labour movement in Manitoba has also been active in developing and delivering settlement services and support, including language training and housing provision. In particular, the United Food and Commercial Workers (UFCW) in Manitoba has been a driving force in creating a nominee program that afford workers' significant protections – at least in unionized workplaces.

One of the main developments being pioneered by UFCW in Manitoba is a scheme of collective agreement provisions that directly addresses some of the insecurities confronting temporary foreign workers and provincial nominees. To date, collective agreements with these

provisions have been negotiated with Maple Leaf Foods in the city of Brandon and with Springhill Farms in the town of Neepowa.¹¹⁰ These agreements address the first three PNP design failures discussed in Part IV. First, they partially prevent employers from using nominations as levers of control over individual workers, by requiring that the employers will process all work permit renewals and forms for permanent residency applications in a timely manner.¹¹¹ While this particular provision appears limited on its face, it is arguably of major importance to foreign workers. By including these nomination processes in collective agreements and therefore making them eligible to grievance and arbitration procedures, employers are presented with incentives to avoid abuses and foreign workers are provided with better access to institutional safeguards. Additional provisions provide for expedited arbitration hearings in the case of a foreign worker's termination – also a key point of vulnerability for these workers – and require employers to continue processing all necessary paperwork for the worker to remain in Canada.¹¹² These provisions go some way toward preventing employers from avoiding their obligations and from applying undue pressure to workers. Second, the agreements themselves require that the text of collective agreement to be translated into languages where there is a critical mass of native speakers employed, and require the employer to provide translators when required. Since language can often pose a major barrier to workers' access to information about their rights and about the details of nominee program eligibility requirements, these services can help to address some of the uncertainty created by nominee application processes. Third, basic language support provisions have provided a jumping-off point for the UFCW to become an

¹¹⁰ “Agreement between Maple Leaf Foods, Inc. and United Food and Commercial Workers Union, Local No. 832” Expiring December 31, 2014 [“Maple Leaf Foods Collective Agreement”]; “Agreement between Springhill Farms and Freezerco and United Food and Commercial Workers Union, Local No. 832” Expiring December 31, 2015 [“Springhill Farms Collective Agreement”] (on file with the author).

¹¹¹ See “Maple Leaf Foods Collective Agreement”, *ibid.* at s. 33.01 and “Springhill Farms Collective Agreement”, *ibid.* at s. 49.01.

¹¹² See “Maple Leaf Foods Collective Agreement”, *ibid.* at s. 33.04 and “Springhill Farms Collective Agreement”, *ibid.* at s. 49.03.

active services provider in other areas outside of the collective agreement, including language training and housing settlement support. Overall, these developments likely work to cultivate norms related to shared-understanding and mutual support between domestic and foreign workers, and between workers and employers.

Organized labour's role in Manitoba, however, must be viewed in its proper context and is not without apparent risks for workers. While protections and services for workers developed by organized labour may have motivated the provincial government to become more responsive to the needs of temporary workers and provincial nominees, these developments have also taken place within an environment of strong government support for permanent economic immigration.¹¹³ As discussed above, the MPNP was from its early beginnings oriented toward regional immigration strategies, which include concerns not only with labour shortages but also with population growth and demographic and geographic diversification. As well, Manitoba's current pro-labour, New Democratic government has been highly responsive to workers' rights and has independently developed settlement services for nominees and new immigrants under funding agreements with the federal government.

Without active participation from a provincial government that seeks to work with third-party stakeholders and employers rather than derogate public responsibility for regulation and support services, it is likely that these types of third-party activities will be insufficient to comprehensively meet the needs of vulnerable foreign workers and nominees. Clearly, the advantages of collective bargaining are only available in unionized workplaces, and it is questionable whether provincial nominees are being adequately protected even under Manitoba's relatively well-developed set of employment standards and immigration services. In provinces

¹¹³G. Clement, "The Manitoba Experience" in Charles M. Beach & Jeffery G. Reitz, eds. *Canadian Immigration Policy for the 21st Century* (Kingston: John Deutsch Institute for the Study of Economic Policy, 2003).

such as Alberta where governments continue to promote TFWPs as a main source of temporary economic immigration, where nominee programs themselves continue to be highly unstable and open to employer abuses, and where governments have generally failed to provide any substantial supports or protections for temporary workers and provincial nominees, the wisdom of relying too heavily on third-party actors as a long-term strategy appears generally unsound.

The limits of offloading provincial responsibility for PNPs onto third parties such as organized labour are striking in circumstances where there are systemic or legislative barriers to participation for these parties. In Ontario, for example, agricultural workers are specifically excluded from the province's labour relations regime.¹¹⁴ As a result, these workers—including foreign workers in the agricultural sector—are cut off from the provincial collective bargaining scheme, making it far more difficult for these workers and their advocates to implement even the qualified advances that have been pioneered by organized labour in Manitoba. The challenges currently facing agricultural workers in Ontario represent a sharp reminder that relying disproportionately on non-government actors to craft regulation and provide support in respect of the PNPs will likely disadvantage specific groups of vulnerable foreign workers and leave them to fall through the cracks of a patchwork of institutional controls and services.

At the national level, the devolution of provincial obligations to private actors will make it increasingly difficult to coordinate program design and regulatory controls between provincial jurisdictions and with the federal government. While organized labour has demonstrated an impressive ability to address some of the gaps left by the PNPs, these efforts are likely to remain essentially localized and their success will be determined on a case-by-case, depending on

¹¹⁴ *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16 [AEPA] [the *Labour Relations Act* “does not apply to employees or employers in agriculture” at s. 18]. In *Fraser v. Ontario (Attorney General)*, [2008] ONCA 760 (CanLII) the Ontario Court of Appeal struck down the AEPA as an unjustifiable infringement on workers' freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*. That case is currently on appeal to the Supreme Court.

specific workplace needs and employer interests.¹¹⁵ If, as present trends seem to indicate, Canada's system of economic immigration continues to become more decentralized, these points of coordination will become increasingly important determinants of outcomes for workers. For example, as the discussion above makes clear, many of the problems of nominee program design arise as a response to the TFWPs. Manitoba has been successful, to a certain extent, in designing its PNP to utilize these as "transitional" rather than "temporary" worker programs. A more effective strategy going forward, however, would likely be for provinces to use their past experiences with the PNPs as a starting point – perhaps within the context of the federal-provincial immigration agreements – to negotiate with the federal government for fundamental reforms to the TFWPs. To do so, of course, will require provincial governments to consider closely whether it will be possible, and desirable, for the PNPs to remain wedded to a market-based, employer-driven model of economic immigration.

Lastly, the role of organized labour will always be circumscribed by the dynamics of opposing interests and collective bargaining. Ultimately, decision-makers need to question why it is that foreign workers and nominees are required to bargain for their basic rights and entitlements in the first place. Not only does this situation offend principles of equality, it effectively places the onus on vulnerable workers to make up for failures of program design at provincial and federal levels. This reality likely undermines much of the goodwill and the processes of norm building that organized labour has helped to promote in workplaces that participate in the PNPs and, in the long run, it ultimately threatens to erode Canada's reputation as a desirable destination for economic immigrants.

¹¹⁵ Of course, national unions such as UFCW will have certain advantages in coordinating policies more broadly than specific workplaces and localities. But this advantage only serves to underscore the importance of coordination by provincial and federal governments, in order to work with unions on a wider scale.

6. Lessons for Ontario (and Others)

A question posed at the outset of this study asked whether, and how, Ontario should extend or redesign its nascent PNP to make vulnerable lower-skilled workers eligible to be nominated for permanent residency in the province. In light of experiences elsewhere, Ontario should consider at least two general insights that follow from the preceding analysis.

(1) Employer-driven recruitment and nominee selection processes place serious limitations on the opportunities to address foreign workers' employment-related insecurities through the PNPs. While these program, in principle, should address workers' temporary status as a cause of their insecurities, current design and practice do not go much further than to perpetuate the imbalances in bargaining power built into federal TFWPs. Understood from this perspective, PNPs act less as a "response" to the problems of temporary status and more as an extension of existing trends. While provinces such as Manitoba have innovated significant legislative reforms and promoted third-party participation in order to correct some of these imbalances, Ontario should also consider alternative models for provincial economic immigration, with the overarching goal being to reduce employers' reliance on TFWPs and to put decision-making power back into the public hands. Nothing in the federal-provincial framework agreements on immigration would seem to preclude a strategy that moves away from employer-led immigration. Indeed, the emphasis in these agreements on federal-provincial cooperation is an encouraging orientation along these lines.

(2) In jurisdictions where PNPs are likely to remain employer-driven, provincial and federal governments should work together to ensure strong regulatory standards and to take the lead in settlement service provision. In spite of concerns about employer-led immigration programs as a whole, some worker advocates are likely to argue that existing PNP models

remain the only options available for lower-skilled individuals to acquire permanent residency status and to realize the full, long-term benefits of the economies that these workers themselves have helped to build. While governments should clearly work to cultivate the participation of third-parties such as organized labour, as well as responsible employers, decision-makers should also be aware of the significant risks posed by vacating key areas that impact on workers' insecurities and the potential for uneven and unequal outcomes for workers both within and between provincial jurisdictions. As Ontario considers its options going forward, it should actively consult with these third-party actors and assess carefully, in context, their various strengths and capacities to supplement public policy and action.