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DISHING UP MIGRANT WORKERS FOR THE CANADIAN FOOD SERVICES SECTOR: LABOR LAW AND THE DEMAND FOR MIGRANT WORKERS

Judy Fudge† and Joo-Cheong Tham††

I. INTRODUCTION

Why do certain sectors such as hospitality, cleaning, construction, and agriculture rely on temporary migrant labor?¹ The typical explanation is that work in such sectors is dirty, dangerous and demeaning, and that national workers, who have labor mobility and better options than their migrant counterparts, refuse to perform this work. In this article, we stress the significance of labor regulation in shaping the quality and conditions of work of work in these sectors *and* in creating a sector-specific demand for “low-skilled” migrant labor, which we define as workers without formal credentials (recognized by the receiving state) who do not have a right permanently to reside in the country in which they work. In doing so, we treat the perspectives that immigration is a variable explaining capitalist institutions and a variable explained by capitalist institutions as complementary and not competing.²

Although labor law has become an important lens for examining migrant labor, the focus tends to be on the employment rights of migrant workers and the difficulty that these workers face in enforcing their rights.³ Employing a wider angle, some researchers explore the role of international migration “as

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1. See INTERNATIONAL LABOUR ORGANIZATION, TOWARDS A FAIR DEAL FOR MIGRANT WORKERS IN A GLOBAL ECONOMY 48-57 (2004); Sam Scott, *Migration and the Employer Perspective: Pitfalls and Potentials for a Future Research*, 19 AGENDA POPULATION, SPACE, PLACE 703 (2013).

2. Alexandre Afonso & Camilla Devitt, *Comparative Political Economy and International Migration*, 14 SOCIO-ECONOMIC REV. 591, 592 (2016).

3. CATHRYN COSTELLO & MARK FREEDLAND, MIGRANT AT WORK (2014); TEMPORARY LABOUR MIGRATION IN A GLOBAL ERA: THE REGULATORY CHALLENGES (Joanne Howe & Rosemary Owens eds., 2016); LAURIE BERG, MIGRANT RIGHTS AT WORK: LAW’S PRECARIOUSNESS AT THE INTERSECTION OF MIGRATION AND LABOUR (2016).

a regulatory labor market tool" and concentrate on how certain forms of temporary migration programs suppress wage rates, lower labor standards, and create extreme forms of flexible employment practices.⁴ This article is also concerned to understand the labor-migration nexus, but instead of looking at how immigration shapes labor markets, it reverses the lens to consider how labor market regulation shapes immigration policy.⁵ In doing so, it draws on Anderson and Ruhs' insight that employer demand for migrant workers can be explained by "system effects," "which arise from the institutional and regulatory frameworks of labor market and wider public policies (e.g., welfare and social policies)" that "'produce' certain types of domestic labor shortages."⁶

This article examines one subsector—food services—in order to explore the symbiotic relationship between migration controls and labor market regulation with the goal of illustrating how labor market institutions in a specific sector shape government responses to employers' demand for migrant labor. Specifically, we focus on the demand for migrant labor in the food services sector in the province of British Columbia in Canada to show how labor regulation in that sector reinforces precarious work, creates a domestic labor shortage, and shapes employer preferences for migrant workers. We use the case study to address two questions: How does the institutional and regulatory framework for the food services sector in the province of British Columbia shape employer demand for migrant workers? How did the federal government respond to employer demand for migrant workers in the food services sector?

In answering these questions, this article is designed to contribute to a broader understanding of the labor law and migration law nexus in two ways. First, it suggests that the concept of conditionality, which is explained in the next section, can fruitfully be used to understand what makes migration status precarious and, importantly, to recognize that employers and states are actors that are involved in the creation of precarious migrant status. Second, it illustrates how labor regulation of a specific sector creates a demand for precarious migrant workers and, in turn, shapes labor migration policies within a specific national setting.

4. HARALD BAUDER, LABOR MOVEMENT: HOW MIGRATION REGULATES LABOR MARKETS 4 (2006); Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 WORK, EMP. & SOC'Y 300 (2010); Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34 COMP. LAB. L. & POL'Y J. 95 (2012).

5. Sebastien Chauvin, Blanca Garces-Mascarena & Albert Kraler, *Employment and Migrant Deservingness*, 51 INT'L MIGRATION 80 (2013).

6. See Bridget Anderson & Martin Ruhs, *Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy*, in WHO NEEDS MIGRANT WORKERS? LABOUR SHORTAGES, IMMIGRATION AND PUBLIC POLICY 16 (Martin Ruhs & Bridget Anderson eds., 2010).

We begin by setting out our conceptual framework, which is followed by a brief sketch of labor migration policy and the food services sector in Canada. Having set the stage, we present the case study. In the conclusion, we draw out what the case study illustrates about the relationship between the institutional and regulatory framework of a sector and employer demand for specific types of migrant labor.

II. CONDITIONALITY AND SECTOR: CONSTITUTING A DEMAND FOR PRECARIOUS MIGRANT WORKERS

A. *From Temporary to Conditionality: Precarious Migrant Status*

Most of the literature that explores the relationship between immigration policies and labor market regulation focuses on temporary labor migration policies that provide migrants with a limited right to reside in the host country.⁷ Such programs are scrutinized because they have “often been accompanied by the segmentation of the host’s country’s labor market and the emergence of ‘immigrant sectors’.”⁸ Temporary labor migration programs tend to construct and reinforce labor market segmentation because they establish and legitimate hierarchies of formal, as well as substantive, rights and membership, and, thus, are associated with social exclusion and inequality.⁹

But while temporariness is an element in what makes migrants vulnerable to poor, and often unlawful, treatment by employers, the temporary nature of the migrant’s visa does not necessarily make migrant workers vulnerable to labor exploitation or their migration status precarious.¹⁰ For example, intra-corporate transfers in the financial sector from the United States to Canada under the North American Free Trade Agreement and nurses in Australia on a skilled workers visa are unlikely to be vulnerable to exploitation by their employers even though their residence

7. Fudge, *supra* note 4; COSTELLO & FREEDLAND, *supra* note 3; TEMPORARY LABOUR MIGRATION IN A GLOBAL ERA, *supra* note 3; Joo-Cheong Tham, Iain Campbell & Martine Boese, *Why is Labour Protection for Temporary Migrant Workers so Fraught?: A Perspective from Australia*, in TEMPORARY LABOUR MIGRATION IN A GLOBAL ERA: THE REGULATORY CHALLENGES 173, 176-77 (Joanne Howe & Rosemary Owens eds., 2016) (noting the need to be precise in the use of the adjective temporary when it comes to migration programs. They are careful to use it to refer only to a migrant’s initial right of residence.).

8. Martin Ruhs, *Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work*, in PERSPECTIVES ON LABOR MIGRATION, SOCIAL PROTECTION SECTOR, INTERNATIONAL MIGRATION PROGRAMME 6, 10 (2003).

9. Mimi Zou, *The Legal Construction of Hyper-dependence and Hyper-Precarity in Migrant Work Relations*, 31 INT’L J. COMP. LAB. L. & INDUS. REL. 141 (2015).

10. Luin Goldring, *Resituating Temporariness as the Precarity and Conditionality of Non-citizenship*, in LIBERATING TEMPORARINESS: MIGRATION, WORK AND CITIZENSHIP IN AN AGE OF INSECURITY IN CANADA 218 (Leah F. Vosko, Valerie Preston & Robert Latham eds., 2014).

in the host country is temporary. Skill, wealth and union representation act as buffers against employer exploitation even in cases in which a migrant's visa is tied to an on-going relationship with an employer.¹¹ Thus, temporariness is only one dimension of what makes a migrant's legal status precarious.

Migration scholars have developed an important multi-dimensional approach to "precarious legal status" that captures "multiple and potentially variable forms of non-citizen and non-resident status."¹² Precarious legal status is defined in opposition to permanent residence and citizenship, and typically includes: the need for a work authorization, which often requires sponsorship by a specific employer; restrictions on changing employers; temporary residence or permanent residence dependent upon sponsorship by a third party such as an employer or family member; the lack of social rights available to permanent residents; and the inability to sponsor the residence of family members.¹³

Constructed by state policies and practices, precarious legal status consists of a complex "chutes and ladders of legal status," in which a migrant can become more precarious by losing the right to work or to reside, and, alternatively, become less precarious by gaining permanent residence.¹⁴ A key advantage of this conception of precarious status, which focuses on the legal rights and restrictions imposed by the state, is that it captures the dynamic and contingent nature of migrant status.

However, the problem with stressing legal status as the key to understanding the precariousness of migrants is that it offers a formal, rather than substantive, understanding of what makes migrants precarious, and it ignores the role of actors other than the State in creating (or alleviating) precarity.¹⁵ The social location—sex, age, ethnicity, country of origin, skill and language—of the migrant workers and the broader sectoral and institutional context combine with legal status to amplify or ameliorate migrants' experience of precariousness.¹⁶ Moreover, while states establish immigration policies, increasingly temporary *and* permanent migration is employer-driven. Employers select temporary migrants by offering them employment and obtaining work permits for them, and, under certain

11. Martina Boese et al., *Temporary Migrant Nurses in Australia: Sites and Sources of Precariousness*, 24 ECON. & LAB. REL. REV. 216 (2013); Stephen Castles, *Migration, Crisis, and the Global Labour Market*, 8 GLOBALIZATIONS 311 (2011).

12. Luin Goldring, Carolina Berinstein & Judith K. Bernhard, *Institutionalizing Precarious Migratory Status in Canada*, 13 CITIZENSHIP STUD. 239, 245 (2009)

13. *Id.* at 240–41.

14. Goldring, *supra* note 10; Boese et al., *supra* note 11.

15. Goldring, *supra* note 10, at 4

16. Marcel Paret & Shannon Gleeson, *Precarity and Agency through a Migration Lens*, 20 CITIZENSHIP STUD. 277 (2016); Iain Campbell & Robin Price, *Precarious Work and Precarious Workers: Towards an Improved Conceptualization*, 27 ECON. & LAB. REL. REV. 1 (2016)

programs, they are able to go on sponsor these workers as permanent residents. Thus, employers play an important role in determining whether or not migrants are able successfully to navigate the chutes and ladders of legal status.

The concept of conditionality captures both the substantive conditions and other actors that shape whether or not a particular migrant status is precarious. Goldring explains conditionality as “the social production, contingency, and potential vulnerability that surround people’s ability to remain present in a jurisdiction or in a legal status category, and their access to public goods, social rights, and protections.”¹⁷ Through its simultaneous focus on the formal conditions of precariousness (including restrictions on employment opportunities through tying migrants’ visas to an on-going relationship with a specific employer or by restricting migrants’ hours of work) and substantive factors (such as labor market practices and their interaction), the concept of conditionality illuminates the mechanisms that shape the labor market experiences of migrant workers. It brings to the fore the role of key labor market actors such as unions, regulators, migrants’ advocate groups and employers. Moreover, as the following discussion shows, it allows us to see how the institutional and regulatory framework governing the sectors in which they operate shapes the role of employers in relation to migrant workers.

B. Sector-specific Demand for Migrant Labour

This emphasis on the sector for understanding employer demand for migrant labor accords with industrial relations literature, which has focused on the sector as the “most relevant level for the definition” of “work rules, actors and regulations.”¹⁸ Different sectors are shaped by specific product and labor markets, and, in some cases, sector-level labor regulation, resulting in different workforces, different work practices and different economic contexts.¹⁹ A sector “can be seen as an institutional environment which influences constituent organizations through ‘regulatory’, ‘mimetic’ and ‘normative’ mechanisms as well as through the economic forces of competition.”²⁰

The sector clearly has a profound influence on employer demand for labor, including migrant labor. This insight allows for a better understanding

17. Goldring, *supra* note 10, at 220.

18. Barbara Bechter, Bernd Brandl & Guglielmo Meardi, *Sectors or Countries? Typologies and Levels of Analysis in Comparative Industrial Relations*, 18 EUR. J. INDUS. REL. 185 (2012); Einat Albin, *The Sectoral Regulatory Regime: When Work Migration Controls and the Sectorally Differentiated Labour Market Meet*, in MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW 134 (Cathryn Costello & Mark Freedland eds., 2014).

19. Bechter, Brandl and Meardi, *supra* note 18, at 187.

20. Mark Bray & Peter Waring, *The (Continuing) Importance of Industry Studies in Industrial Relations*, 51 J. INDUS. REL. 617, 620 (2009).

of why there is a concentration of migrant workers in industries such as agriculture, construction, manufacturing, domestic work and hospitality. A common explanation of why migrant workers often perform “3D” jobs—those which are “dirty, dangerous and demeaning”—is that they have more limited employment opportunities compared to “local” workers who shun such work.²¹ However, the difficulty with the 3D explanation is that it naturalizes both the (poor) quality of such jobs and the labor market outcomes of labor migration. In doing so, it neglects how the quality of jobs and the consequences of labor migration are fundamentally shaped by social, political and economic processes in which not only workers make choices, but so, too, do employers, governments and other actors such as unions and regulators.

This article foregrounds the social, political and economic processes that take place at the sectoral level, highlighting the precarious work norms that often characterize the sectors where low-skilled migrant workers are concentrated (including the food services sector). These norms are constituted by the interaction of labor market regulation and employer practices. A weak regulatory framework characterizes sectors that rely on low-skilled migrant workers. Often *de jure* regulation is set at relatively low levels with no or limited collective bargaining and *de facto* regulation falls below the legal norms because the regulation is poorly enforced due to poor union presence, limited effectiveness of the enforcement agency and the constrained agency of a vulnerable workforce. In these sectors, employers’ labor-use strategies often involve precarious work arrangements and low wages.²² The weak regulatory framework reinforces a business model based upon precarious work.

In this way, systemic effects of institutional and regulatory frameworks and public policies shape employer demand. Precarious work arrangements in a sector along with social policies pertaining to unemployment insurance and social assistance can constrain the supply of domestic workers willing to work in the sector under prevailing terms and conditions. In turn, this domestic labor “shortage” gives rise employer demands for migrant workers to fill these jobs. Migrant workers can be particularly attractive to employers because of the conditionalities they experience. With employer-sponsored visas, for instance, migrant workers are unable to exit and find another job. Nationality-based stereotyping by employers (e.g., migrant workers are more “hardworking” and “reliable” than local workers) can combine with the willingness of workers to tolerate the working conditions in a sector on account either of their dual frame of reference or their inability to access other

21. Anderson & Ruhs, *supra* note 6, at 26.

22. Campbell & Price, *supra* note 16.

means of support.²³ These attributes and conditionalities combine to create the “soft” skills that employers come to prefer. In these situations, as Anderson and Ruhs insightfully observe, “there is a *dynamic* and *mutually conditioning* relation between labor demand and supply”—“what employers ‘want’ can be critically influenced by what employers ‘think they can get’ from different groups of workers, and at the same time, labor supply adapts to the requirements of demand.”²⁴

The demand for migrant labor in is expressed in two main ways: through employers’ hiring practices and their political activities, in particular, the lobbying by their employer associations for more liberal labor migration programs.²⁵ By focusing on a sector-based case study of food services, this article emphasizes the extent to which sector-specific employment norms, which tend to be relatively uniform across different economies, shape employers’ demand for migrant labor.²⁶ For example, employers in service sectors with weak levels of unionization and market-based coordination—such as the food services sector—are much more likely than employers in the manufacturing sector, where union density is high and there are sectoral training schemes, to support liberal migrant labor programs.²⁷ However, as we shall see, electoral concerns influence how governments respond to employers’ demands for migrant labor. In Canada, as elsewhere, we see the tension between employer interests and the interests of the “nation” shaping temporary labor migration schemes.²⁸

III. SETTING THE STAGE: IMMIGRATION POLICY AND THE FOOD SERVICES SECTOR

In Canada, jurisdiction over immigration is divided between the federal government and the provinces/territories, although the federal government historically has taken the lead. By contrast, the ten provinces and three territories have primary jurisdiction over labor law. This divided jurisdiction is important for understanding regionally specific demands for migrant labor by employers in the food services sector.

23. Anderson & Ruhs, *supra* note 6.

24. *Id.* at 16.

25. Georg Menz, *Employer Preferences for Labour Migration: Exploring ‘Varieties of Capitalism’-Based Contextual Conditionality in Germany and the United Kingdom*, 13 BRIT. J. POL. & INDUS. REL. 534 (2011); Chris Wright, *Immigration Policy and Market Institutions in Liberal Market Economies*, 43 INDUS. REL. J. 110 (2012).

26. Anderson & Ruhs, *supra* note 6; ALEXANDER CAVIEDES, *PRYING OPEN FORTRESS EUROPE: THE TURN TO SECTORAL LABOR MIGRATION* (2010).

27. CAVIEDES, *supra* note 26.

28. Kristin Surak, *Guestworkers: A Taxonomy*, 84 N. LEFT REV. 84, 89-90 (2014).

A. From Permanent to Temporary Migration and the Growth of a Low-Skilled Component

Although Canada has historically been a settler country of permanent migration, there has been a steady shift to labor migration granted on a temporary basis.²⁹ The broad move to temporary work visas, which targeted high-skilled workers, began in the 1970s, with the expansion occurring in the mid-1990s.³⁰ The temporary migration programs were used to facilitate the settlement of skilled workers as temporary migrants transitioned to permanent settlement. The increased reliance on temporary labor migration signaled a broader shift to employer-driven schemes whereby governments delegate important administrative functions, such as determinations of skill and labor shortages and worker recruitment and selection, to market actors.³¹

Despite the emphasis on high-skilled workers in the temporary migration programs, since the 1960s Canada has had two small, dedicated low-skilled temporary migration schemes for agriculture and domestic work.³² This experience meant that in 2002 the federal government was able to respond to employer demand for low-skilled migrant labor by introducing a pilot program designed for low-skilled labor that was not tied to a specific sector, the Low-Skilled Pilot Project.

B. Characteristics of Employment in the Food Services Sector

Food services is a place-embedded sector in which migrant labor is structurally rooted. It is a labor intensive sector, and employers have devised a number of ways to reduce costs, from shifting some of the wage to customers in the forms of tips, flexible scheduling and Taylorist processes, depending upon the type of establishment and the social norms relating to labor gratuities.³³

Food services comprise establishments primarily engaged in preparing meals, snacks and beverages, to customer orders, for immediate consumption

29. James Walsh, *From Nations of Immigrants to States of Transience: Temporary Migration in Canada and Australia*, 29 INT'L SOC'Y 584 (2014). CATHERINE DAUVERGNE, *THE POLITICS OF IMMIGRATION AND THE END OF SETTLER SOCIETIES* (2016).

30. NANDITA RANI SHARMA, *HOME ECONOMICS: NATIONALISM AND THE MAKING OF "MIGRANT WORKERS" IN CANADA* (2006).

31. Judy Fudge & Fiona MacPhail, *The Temporary Foreign Worker Program in Canada: Low-skilled Workers As an Extreme Form of Flexible Labor*, 31 COMP. LAB. L. & POL'Y J. 5 (2009); Walsh, *supra* note 29.

32. Fudge, *supra* note 4.

33. ESTER REITER, *MAKING FAST FOOD :FROM THE FRYING PAN INTO THE FRYER* (2001); TONY ROYLE & BRIAN TOWERS, *LABOUR RELATIONS IN THE GLOBAL FAST FOOD INDUSTRY* (2002); Robin Leidner, *Fast Food Work in the United States*, in *LABOUR RELATIONS IN THE GLOBAL FAST FOOD INDUSTRY* 8 (Tony Royle & Brian Towers eds., 2002); Rosemary Lucas & Steve Mansfield, *The Use of Migrant Labour in the Hospitality Sector*, in *WHO NEEDS MIGRANT WORKERS? LABOUR SHORTAGES, IMMIGRATION AND PUBLIC POLICY* 159 (Martin Ruhs & Bridget Anderson eds., 2010).

on and off the premises.³⁴ Businesses in this sector range from full-service restaurants to fast food and take-away shops. The food services sector contains numerous outlets, sometimes organised in large chains as franchises, but most often as small enterprises, often family-owned and operated.³⁵ Because it provides food services, generally to individual customers, the sector is directly affected by fluctuations in customer demand (daily, weekly, and according to the season). It is highly competitive, with significant pressure on margins and profits. Some outlets can trade on the basis of a reputation for quality, but most rely heavily on cost minimization strategies to survive. Small employers, in particular, often operate in a very “informal” way on the borderlines of illegality.³⁶ Employers in the sector often lobby for low and flexible labor standards on the ground that the resulting costs, which will be passed on to consumers, will simply price them out of business.

Government statistics on employment in this sector divide the jobs into two general categories: the first comprises food servers who take patrons’ food and beverage orders, and serve orders to patrons; and the second group are food counter attendants, food preparers, kitchen helpers, and dishwashers who clear tables, clean kitchen areas, wash dishes and perform various other activities to assist workers who prepare or serve food and beverages.³⁷ Different types of food service establishment recruit workers with different types of characteristics. In 2011, in British Columbia women held 80% of the food and beverage server jobs,³⁸ while women accounted for 66% of food counter workers.³⁹ The workforce is young and full-time students are also heavily concentrated in this sector.⁴⁰ The bulk of employment in the food services sector in Canada is low skilled, wages are low, as is union density, and there are few collective agreements.

Workers’ schedules are typically insecure and unpredictable and part-time employment dominates.⁴¹ The sector has a very high employee turnover,

34. North American Industry Classification System definition of the Accommodation and Food Services (NAICS 72) sector, <https://www.ic.gc.ca/app/scr/sbms/sbb/cis/definition.html?code=72>.

35. In Canada in 2015, 62.3% of expenditures in restaurants (including full and quick service) was in branded local, regional, national and international chains. GE Capital Franchise Finance, Canadian Chain Restaurant Industry Review 3 (2015), available at http://www.restaurantinvest.ca/site/restaurant_invest/assets/pdf/2015_canadian_chain_restaurant_industry_review.pdf.

36. Tessa Wright & Anna Pollert, *The Experience of Ethnic Minority Workers in the Hotel and Catering Industry: Routes to Support and Advice on Workplace Problems*, Ref: 03/06, ACAS, available at http://www.acas.org.uk/media/pdf/0/b/03-06_1.pdf.

37. Work BC, Accommodation and Food Services, available at <https://www.workbc.ca/Job-Seekers/Industry-Profiles/1#section-employment>.

38. Work BC, *Food and Beverage Servers (NOC 6513)*, available at <https://www.workbc.ca/Jobs-Careers/Explore-Careers/Browse-Career-Profile/6513>.

39. Work BC, *Food Counter Attendants, Kitchen Helpers and Related Support Occupations (NOC 6711)*, available at <https://www.workbc.ca/jobs-careers/explore-careers/browse-career-profile/6711>.

40. Service Canada, *Job Futures: Food and Beverage Servers*, 2015, available at http://www.otec.org/Files/pdf/resources/SupplyDemand_Ind_FB_Current_EN.aspx.

41. Service Canada, Food and Beverage Servers, Unit Group 6453, 2

mainly because of the difficult working conditions (evening and weekend work, seasonal variations, part-time work, etc.), the frequent openings and closings of food outlets, uncompetitive wages, and the decline in the number of young people who form the main labor pool. The turnover is also attributable to students leaving their jobs after graduating, as well as to other individuals working as servers who leave once they find a job with better working conditions in a different field.⁴²

A prominent group of food services employers are “fast food” businesses—food services employers that sell mass-produced food with a premium placed on efficiency of production in terms of time taken (fast); calculability (consumer decisions based quantity over quality); predictability (standardised products); and control over the production process.⁴³ For these employers, minimizing labor costs through the physical organization of worksites and the application of scientific management systems of control is a key business strategy.⁴⁴

A chronic challenge confronted by fast-food management is how to contend with high turnover. The fast food industry was a key player in persuading the government to expand the low-skilled stream of the Temporary Foreign Workers Program to include the service sector since migrant workers on employer-specific visas are an attractive source of labor.⁴⁵

IV. FOOD SERVICES AND MIGRANT LABOR

We begin our case study by situating food services employers' claim that they were experiencing a labor “shortage,” and, thus, needed greater access to the low-skilled temporary migration program, in the context of newly elected British Columbia's government's deregulation of labor standards. We then show how the federal Conservative government's liberalization of the low-skilled temporary workers program resulted in a significant increase the number of low-skilled migrant workers in the food services sector. Next we explain why food services, and especially fast food, employers considered these workers to be “attractive.” After charting the backlash against the use of these workers by fast food employers and the consequent tightening of the low-skilled temporary migration program under the Conservative government and food service sector's response the changes,

42. *Id.* at 1-2.

43. GEORGE RITZER, *THE McDONALDIZATION OF SOCIETY* (8th ed. 2014); GE Capital Franchise Finance, *supra* note 35.

44. ROYLE & TOWERS, *supra* note 33, at 19.

45. Aida Geraldina Polanco Sorto, *Behind the Counter: Migration, Labour Policy and Temporary Work in a Global Fast Food Chain* 34-35 (Dec. 2013) (Ph.D. dissertation, University of British Columbia), available at <https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0166829>.

the final section turns to changes made by the federal Liberal government, which was elected in 2016, to the temporary foreign workers program.

A. Constructing a Labor Shortage

Named after a hockey player and originating as a small donut and coffee shop, Tim Hortons is an iconic Canadian institution and Canada's largest fast food operator.⁴⁶ With thousands of outlets, typically run by franchisees, across the country, Tim Hortons was dissatisfied with the local labor pools from which it recruited counter service workers.⁴⁷ It joined with hospitality industry lobbyists to persuade the federal government that access to low-skilled temporary migrant labor was necessary to address what it depicted as an urgent labor shortage. This effort did not have much success until 2006, when the pro-business and western-based Conservative Party formed a minority government. In January 2007, the federal minister responsible for protecting the employment and working standards for Canadian workers declared, "when the labor shortage starts to affect our ability to go to Tim Hortons and get a double-double I'd say we've got a serious problem."⁴⁸

The concerted effort to expand the Low-Skilled Pilot Project (LSPP), which was introduced in 2002 under the Temporary Foreign Worker Program, to include service sector occupations originated in Canada's two most western provinces, Alberta and British Columbia, which at the turn of the twenty-first century were experiencing a resource-driven economic boom.⁴⁹ The 2010 Vancouver Winter Olympic Games made the tourism sector a central feature of British Columbia's development project, and associations representing tourism and hospitality employers took the initiative to shape labor migration policies.⁵⁰ In 2003, Go2 (a tourism NGO) established a steering committee of employers and corporate stakeholders in order to establish that the sector was experiencing—and would continue to experience—a labor market shortage.

This "labor shortage" must be placed in the context of the provincial government's deregulation of labor standards in British Columbia. Elected on a "business friendly" manifesto in 2001, in 2002 the Liberal government

46. *Id.* at 94. Tim Hortons was taken over by the American owned chain, Burger King, in 2014 making it the third largest fast-food chain on the planet.

47. Polanco Sorto, *supra* note 45, at 38-41.

48. Speaking Notes for The Honourable Monte Solberg, Minister of Human Resources and Social Development. Building Canada's Knowledge Advantage: Creating the best educated, most skilled and most flexible workforce in the world. Public Policy Forum Conference On "Improving Canada's Business Environment and Competitiveness", At Crowne Plaza Hotel, Ottawa, Jan. 23, 2007, <http://www.hrsdc.gc.ca/eng/cs/comm/news/speech/solberg/070123.shtml> (accessed May 12, 2011). A double-double is a coffee with double cream and double sugar.

49. Fudge & MacPhail, *supra* note 31, at 25.

50. Polanco Sorto, *supra* note 45, at 36.

introduced a raft of changes to the Employment Standards Act (ESA), which sets minimum terms and conditions for establishments throughout the province.⁵¹ British Columbia provides a set of quite low standards, which include: ten statutory holidays a year; paid vacation; notice of termination requirements; a 50% overtime premium for working more than eight hours in a day, which increases to 100% after twelve hours; a half-hour unpaid break after five hours; and thirty-two consecutive hours of rest in seven days. There is no statutory unjust dismissal protection and vacation and notice entitlements increase with the length of service.⁵²

The ESA is particularly important because this legislation is virtually the only source of labor standards in the food services sector in British Columbia since collective agreement coverage in the sector is less than 10%.⁵³ Moreover, prevailing wage rates in the sector are closely linked to the minimum wage.⁵⁴ The deregulatory thrust of the government's changes was prefigured by a regulation introduced in November 2001. It created a new First Job/Entry Level Wage of \$6 per hour (\$2 an hour less than the minimum wage) for employees with 500 or fewer hours of cumulative paid employment experience with one or more employers.⁵⁵ Since many young workers obtain their first job in the food services sector this change was a particular benefit to fast-food employers.

Three sets of changes introduced by the 2002 amendments to the ESA were also significant for the food services sector. The first were changes to working-time rules abolishing the requirements that employers post hours-of-work notices informing employees of their shifts and give workers 24-hours' notice of any changes to their schedule. The minimum hours for which employers were required to pay employees who were scheduled to work or who had begun to work but were sent home early was also lowered from four hours to two. The second set of amendments reduced the legal minimum work age from sixteen to twelve with the written consent of a parent, or under twelve with the added permission of the Director of Employment Standards. This change provided a supply of very young workers, who could be paid the new lower minimum wage for 500 hours, to a sector that already disproportionately recruited workers under the age of twenty-four.⁵⁶ The

51. Employment Standards Act, RSBC 1996, c. 113.

52. *Id.*

53. Labour Force Survey, 2013, *Union membership status by occupation at main job (NOC-S 2001)* (1987-). CSM, UC Berkeley.

54. Work BC, *Career Profile: Food counter attendants, kitchen helpers and related support occupations (NOC 6711)*.

55. DAVID FAIREY, *ERODING WORKER PROTECTIONS: BRITISH COLUMBIA'S NEW "FLEXIBLE" EMPLOYMENT* 25 (2005).

56. The number of young people under the age of fifteen working in the food services sector is unknown since this data is not collected, <https://www.workbc.ca/Job-Seekers/Career-Profiles/6711#section-salary>.

third set of changes made it more difficult for employees to pursue ESA complaints and limited employer liability for violating the ESA. The government repealed the requirement imposed on employers to put up posters in workplaces educating workers of their basic legal rights. It also placed the entire responsibility for pursuing a claim under the ESA upon individual employees.⁵⁷ Employees were required to avail themselves of a “Self Help Kit” and complain directly to their employer before being permitted to file a written complaint with the government office charged with enforcing the ESA. Employers’ liability for wages was reduced from two years from the date of complaint or determination to six months, and directors or officers of bankrupt companies were relieved of personal liability for wages owed to employees. In addition to these legal changes, the number of Employment Standards Branch staff was reduced by a third (from 151 to 109) over the 2001 to 2004 period.⁵⁸

Given the low wages, young age of the workforce, the extent of part-time work and the ubiquity of erratic schedules it is little wonder that employers in the food services sector complained of high turn over and labor shortages.⁵⁹ It is a classic example of a sector with poor employment conditions and low-commitment employment relations. But instead of improving the terms and conditions of work in order to attract a more dedicated workforce, food services employers lobbied the Conservative federal government to obtain access to the low-skilled foreign workers. Initially, rigorous requirements for employers to obtain an employment authorization combined with the one-year duration of the work permit to keep the low-skilled migration stream small. However, organizations representing employers in the hospitality sector claimed that they needed quick and easy access to low-skilled temporary foreign workers in order to capitalize on the economic boom while it was underway and that training Canadians to do the jobs would simply take too long.⁶⁰ Soon after it was elected, the Conservative government responded by easing the advertising requirements on employers to obtain an employment authorization, expediting the authorization process, and extending the duration of the work permit from one to two years, with no limit on the number of times a visa could be renewed.

57. FAIREY, *supra* note 55, at 31.

58. *Id.* at 35. The number of complaints received by the Branch office dropped by over 75% within a few months of the introduction of the self-help kit.

59. In 2013, in British Columbia, 42% of the workforce in this sector were under the age of twenty-five, compared with the provincial average of 15%, 40.7% of the employees worked part time, compared with the provincial average of 21.4%, and 18.9% of the jobs were temporary, whereas the provincial average was 11.4%. The average wage for women workers (who comprised 61% of the workforce) and young workers was below the provincial average wage, <https://www.workbc.ca/Labour-Market-Information/Industry-Profiles/1>.

60. Fudge & MacPhail, *supra* note 31, at 25.

B. Speeding up the Delivery of Migrant Labor to the Food Services Sector

The Expedited Labour Market Opinion Project (E-LMO), which was introduced in September 2007, was a joint project of the Alberta, British Columbia and federal governments. It was designed to facilitate access to temporary foreign workers for occupations identified as experiencing acute shortages by reducing the requirements that an employer would have to meet to obtain a Labour Market Opinion (LMO), an employment authorization that was designed to protect jobs for Canadians as well as preserve prevailing wage rates. These lists of "occupations under pressure" were produced in consultation with industry, including the tourism and hospitality sector. Initially the project included only twelve occupations—largely in the construction, healthcare and hospitality industries—but by early 2008 this number had almost tripled to include thirty-three occupations. Among occupations identified as under pressure were food counter attendants.

The combined effect of these changes was to increase the total number of workers in Canada under the TFWP, and to shift the skill and education level, and country of origin of the workers. The numbers of low-skilled workers who were admitted through the program jumped from 15,3659 in 2007 to 25,733 in 2008.⁶¹ In 2005, the top five occupation groupings for which labor market opinions were granted under the TFWP were: musicians and singers; actors and comedians; producers, directors and related occupations; specialist physicians; and other technical occupations in motion pictures and broadcasting. By 2008, the top five were: food counter attendants and kitchen helpers; cooks; construction trades helpers and laborers; light duty cleaners; and musicians and singers—three of which are classified as low-skill.⁶² Food and beverage servers were number six. Between 2005 and 2008, the increase in numbers of workers admitted under the TFWP was almost 900 per cent in accommodation and food services. This occupational shift accompanied a change in the countries of origin of workers admitted under the TFWP. In 2009, 34.3% of workers admitted under the TFWP were from the Philippines, India, China, and Mexico, up from 21.8% in 2000.⁶³

In 2008, British Columbia introduced a Provincial Nominee Program (PNP) that provided a pathway to permanent residence for low-skilled workers who had the support of their employer. This program was designed to attract low-skilled migrants to the province, and it was a critical factor in

61. Fay Faraday, *Made in Canada: How the Law Constructs Workers' Insecurity* 45 (2012), <http://metcalfoundation.com/wp-content/uploads/2012/09/Made-in-Canada-Full-Report.pdf>.

62. Jason Foster, *Making Temporary Permanent*, 19 JUST LAB. 22, 29 (2012).

63. *Id.*

the decision of low-skilled migrants, especially those from the Philippines, to choose to work in BC.⁶⁴ In 2009, two food services occupations (cooks and food counter attendants, kitchen helpers and related occupations) were in the top ten occupations for confirmed LMOs in the province.⁶⁵

Throughout the period that the food services sector complained of a labor shortage, the minimum wage stagnated. The government did not raise the minimum wage between 2001 and May 2011, when it also repealed the lower “learner” minimum.⁶⁶ The minimum wage is particularly significant in this sector.⁶⁷ Moreover, in the third quarter of 2008, Canada entered a recession and unemployment began to rise, with British Columbia and Alberta—the provinces that had the biggest booms—witnessing the largest climb in unemployment rates. While the recession was relatively short-lived, its initial impact was quite deep, with employment dropping at a faster rate than in any post-war recession.⁶⁸ There was a bigger decline in applications under the TFWP in the sectors in which low-skilled workers predominated than other sectors, but in 2010 applications in the food services sector rebounded, suggesting an increasing reliance by employers in that sector on migrant workers as a source of labor.⁶⁹

C. *Unpacking the Taste for Migrant Labour in the Food Services Sector*

Despite the recession, the federal government did not abolish the E-LMO until April 15, 2010, just over a month after the closing of the Vancouver 2010 Winter Olympic Games. Employers in the tourism and hospitality sector were unhappy with this change, as well as the reduction in the length of visas under the low-skilled program from twenty-four months to one year. From an industry perspective, the shortage was not about the numbers of employees who were available, but rather the quality of workers in Canada willing to take these jobs. Recounting her interview with a labor consultant in the fast-food industry, Polanco Sorto explains that the low-skilled program was used “to recruit workers into occupations that are

64. BC Ministry of Jobs, Tourism and Innovation, BC Provincial Nominee Program Evaluation Report 2011, 15.

65. Sarah Marsden, “Silence Means Yes Here in Canada”: *Precarious Migrants, Work and the Law*, 18 CAN. LAB. & EMP. L.J. 1, 6 (2014-2015).

66. The minimum wage moved from \$8.75 an hour to \$9.50 on Nov. 1, 2011 and to \$10.25 on May 1, 2012.

67. The median hourly wage a food counter attendant or kitchen help in BC was \$11.25 Cdn an hour in 2016 and the minimum wage was \$10.85. Work BC, *Food counter attendants, kitchen helpers and related support occupations (NOC 6711)*, <https://www.workbc.ca/Job-Seekers/Career-Profiles/6711#section-salary>.

68. Phillip Cross, *How Did the 2008-2010 Recession and Recovery Compare with Previous Cycles?*, CAN. ECON. OBSERVER, Jan. 2011, available at <http://www.statcan.gc.ca/pub/11-010-x/2011001/part-partie3-eng.htm>.

69. Foster, *supra* note 62, at 30.

'unattractive to Canadians' and in which the only people available for the jobs are 'people that you would not want to employ to serve food in the restaurant because you'll lose your restaurant'.⁷⁰ The industry did not consider workers who were available in the local labor market, such as Aboriginal people, recent immigrants and aging populations, to be desirable fast food employees.⁷¹

What is it that makes migrant workers attractive as fast food employees? The traditional answer is that low-skilled migrant workers are a cheap and disposable workforce. Because their visas are tied to an ongoing employment relationship with the employer who sponsored them, migrant workers are seen as more compliant, more willing to work for low wages, and less mobile than permanent residents.⁷² There is evidence that some employers in the food services sector who employ migrant workers violate the ESA by failing to pay these workers regular wages and for overtime hours, making illegal deductions from their wages, failing to keep records, and taking reprisals for the bringing of complaint.⁷³ Although inadequate pay, work beyond the job description, and illegally long hours are not unique to precarious migrants in the food services sector, precarious migrant status can magnify the effect of those conditions on workers.

However, in her study of the shift from local to global recruitment practices in western Canada's low-waged service sector, Polanco Sorto argues "cheapness and disposability fails to fully capture the spectrum of motivations informing the employment of [temporary foreign workers] across programs and industries."⁷⁴ Focusing on Tim Hortons' transnational recruitment of migrant workers, she demonstrates that migrant workers cost more than their domestic counterparts. First, Tim Hortons Corporation, the franchisor, invested significant resources to recruit Filipino migrant workers.⁷⁵ By 2010, it had taken over most of the recruitment of migrant workers for its Alberta and British Columbia franchisees. Second, not only are employers required under the low-skilled TFWP to pay all of the costs associated with recruiting migrant workers, including travel costs, they must guarantee them full-time hours. Third, Polanco Sorto explains that the wages

70. Polanco Sorto, *supra* note 45, at 35-36.

71. *Id.*

72. Foster, *supra* note 62.

73. Seventy-seven employees of the restaurant chain Denny's were part of a class action alleging that Denny's had failed to pay overtime wages and made illegal deductions for recruitment fees and airfares. After the class action was certified, Denny's agreed to a \$1.425 million settlement that was approved by the BC Supreme Court. *Dominguez v Northland Property Corporation*, 2013 BCSC 468. In *United Steelworkers v. Tim Hortons Inc.*, 2015 BCHRT 168, the British Columbia Human Rights Tribunal allowed a group of migrant workers to bring a complaint of discrimination on the basis of nationality against both a Tim Hortons franchisee and the corporate franchisor.

74. Polanco Sorto, *supra* note 45, at 100.

75. *Id.* at 84-85.

that British Columbia employers were required to pay migrant workers employed as food counter attendants was higher than that of their local counterparts. This discrepancy in favor of migrant workers resulted from the TFWP's requirement that migrant workers be paid the prevailing wage rate for the occupational category. The federal department responsible for authorizing the employment of migrant workers allocates region-specific wages for each of the occupations listed under the National Occupational Classification System. In July 2010, the minimum wage, which is the rate at which most counter attendants are paid, was \$8 per hour, while the wage allocated for that occupation under the TFWP was \$10.30 an hour.⁷⁶

Why would Tim Hortons and other fast food franchises like Subway, A&W, Burger King, Dairy Queen, McDonald's and Pizza Pizza employ migrant workers if they cost more than local workers? While there is evidence that food services employers have failed to pay over-time hours and provide guaranteed hours of work, as well as illegally deducted recruitment fees, there is no evidence that these kinds of illegal practices are so widespread that they constitute a business model for the fast-food industry. Instead, it is critical to understand to "industry-specific challenges and benefits of employing [migrant workers]—embodying specific qualities—across occupations and sectors" in order to answer this question.⁷⁷

There are several distinctive features of the food services sector in general and the fast food component in particular that made employers willing to pay a modest premium in the short term for migrant labor. Labor turnover is a perennial challenge in the food services sector.⁷⁸ The work is highly routinized, the pay is low and there are limited career paths, with the result that the employment relationship is low-commitment. The demand for labor in the fast food sector is year round and not seasonal, and labor turnover is costly. Moreover, since the work is interactive and fast paced, employers want a motivated workforce. Local workforces in this sector are drawn from

76. In 2008, the British Columbia Coalition for Businesses wrote to the federal minister responsible for the TFWP to express its members' unhappiness with the prevailing wage rates, as they consider them to be "unfairly higher than average wages of BC employees for the same occupations." Letter from John Winter, Chair, Coalition of BC Businesses to Hon. Monte Solberg, Minister of Human Resources and Skills Development (Apr. 7, 2008), http://www.coalitionbcbusiness.ca/pdf/ELMOLtr_toHon_MonteSolberg.pdf. In 2012, the federal government responded to the business lobby's wage concerns by allowing employers to pay migrant workers admitted under the TFWP less than (by 15% for high-skilled occupations and 5% for low-skilled ones) the specified median wage providing that they could document that they also paid Canadian employees in the same occupation in the same location the reduced amount. Despite this reduction, in the Greater Vancouver area migrant workers would still be entitled to a higher wage than domestic workers. Polanco Sorto, *supra* note 45, at 104. Facing increasing public controversy over the TFWP, in April 2013 the federal government revoked the lower wage rate and returned to the original practice for determining the prevailing wage rate.

77. Polanco Sorto, *supra* note 45, at 11.

78. Tracy Lemieux & Jean-François Nadeau, Temporary Foreign Workers in Canada: A Look at Regions and Occupational Skill, 15 (Office of the Parliamentary Budget Officer, 2015), http://www.pbo-dpb.gc.ca/web/default/files/files/files/TFW_EN.pdf.

workers at both ages of the age spectrum and socially marginalized groups, who are not considered to be ideal by employers who want biddable, eager, service-oriented and hardworking employees.⁷⁹

The conditionalities that make the legal status of migrant workers recruited under the low-skilled TFWP precarious—their residence and permission to work in Canada are tied to their employer and employment contract—go a long way toward explaining why employers in the fast food sector may pay a premium for them; migrant workers are significantly less likely to quit than are their Canadian counterparts. Moreover, some migrants, and especially those from the Philippines, find working in Canada attractive because there is a (very limited) route to permanent residence.⁸⁰ British Columbia has an agreement with the federal government under the Provincial Nominee Program (PNP) that allows it to nominate migrants for permanent residence. Low-skilled migrant workers in the tourism/hospitality sector can apply to the British Columbia nomination program if, among other requirements, they have been employed for nine consecutive months in the province and have a letter offering full-time indeterminate employment from an eligible British Columbia employer. Applicants must remain with their employers throughout the PNP application and permanent residency application process, or else they may be disqualified.⁸¹ Employers function as gatekeepers to permanent residence for migrant workers admitted under the TFWP and the PNP creates fierce competition among workers to be chosen for nomination.⁸² The conditionalities created by the TFWP and PNP allow employers to recruit migrant workers with high commitment without the cost of providing employment conditions that are typically needed to cultivate such a workforce.

In British Columbia, large chains in the fast food sector appear to have developed an employment model that involved paying migrant workers a premium and making them a key component of their core workforce. In 2014, Tim Hortons and McDonalds each employed 4,500 employees through the TFWP. This number amounted to 5% of Tim Hortons' entire Canadian workforce, and most migrant workers were concentrated in Alberta and British Columbia.⁸³

79. Polanco Sorto, *supra* note 45, a 101.

80. *Id.*

81. "Entry Level or Semi-Skilled Worker," Welcome BC, <http://www.welcomebc.ca>.

82. The number of applicants admitted through the hospitality and tourism stream of the BC PNP stream is not high, ranging from 462 in 2008, peaking at 1111 in 2010, and levelling out to 443 by 2013. See Danielle Allen, "For Here or To Go?" Migrant Workers and the Enforcement of Workplace Rights in Canada: A Case Study of Temporary Foreign Hospitality Workers in British Columbia, ch. 3 (LL.M. thesis, University of Victoria, 2017).

83. Justin Giovannetti & Bill Curry, *Restaurants Warn of Closures in Wake of Temporary Foreign Workers Ban*, GLOBE & MAIL, Apr. 24, 2014, <https://beta.theglobeandmail.com/news/politics/restaurants-barred-from-using-temporary-foreign-worker-program/article18203064/?ref=http://www.theglobeand>

D. The Backlash: Putting Canadians First and the Food Services Sector Response

Once the fast food chains business strategy of employing migrant workers became widely known, it triggered a public backlash. The precipitating event was the complaint in April 2014 to the public broadcaster by a young Canadian McDonald's worker in Victoria, British Columbia, that migrant workers from the Philippines were getting higher pay and better hours than Canadian citizens for the same work. He also accused his employer of reducing the hours of Canadian workers and turning away Canadians who were applying for jobs.⁸⁴ This story created a domino effect as reports from across the country of other restaurant employers abusing the TFWP began to emerge.⁸⁵ The federal government's response was quick. The day after the McDonald's story broke, Employment and Social Development Canada (ESDC), the federal department responsible for labor market policy and issuing labor market opinions, launched an investigation into the three Victoria McDonald's franchises that were involved, which resulted in the restaurants being blacklisted from the TFWP.⁸⁶ By the end of the month, EDSC placed an immediate moratorium on all government approvals to hire temporary foreign workers for food services employers in order to conduct a full review of the TFWP. The moratorium fell short of the demand of the British Columbia Federation of Labour, which called for the ban on approving employers' applications for workers lower-skill categories until the TFWP was reviewed.⁸⁷

Although both Tim Hortons' and McDonald's' head offices launched "independent" audits into the use of migrant workers to determine whether their franchisees were violating the terms of the program either by displacing Canadian workers or exploiting migrant workers, the chief executive officers of the two large chains were defiant. Tim Hortons' Chief Executive Officer, Marc Caira, predicted that the loss of foreign workers would compound labor shortages in some regions, making problems such as slow and incorrect orders worse.⁸⁸ McDonald's Canada CEO, John Betts, complained that the

mail.com&.

84. Kathy Tomlinson, *McDonald's Accused of Favoursing Foreign Workers*, CBC NEWS, Apr. 14, 2014, <http://www.cbc.ca/news/canada/british-columbia/mcdonald-s-accused-of-favoursing-foreign-workers-1.2598684>.

85. Canada Economic and Social Development, *Temporary Foreign Worker Program – Moratorium on the Food Services Sector*, Employment and Social Development Canada, http://www.esdc.gc.ca/eng/jobs/foreign_workers/lmo_ref/index.shtml.

86. Tomlinson, *supra* 85.

87. BC Federation of Labour, *Temporary Foreign Workers*, Spring 2014, <http://bcfed.ca/sites/default/files/attachments/BCFED%20backgrounder%20TFWP.pdf>.

88. Greg Quinn, *Tim Hortons says Canada Shouldn't Cut off Foreign Workers*, BLOOMBERG NEWS, June 27, 2014, <https://www.bloomberg.com/news/articles/2014-06-26/tim-hortons-says-canada-shouldn-t-cut-off-foreign-workers>.

stories that Canadian McDonald's' workers were being treated worse than their migrant counterparts was "an attack on our brand" and "an attack on our system."⁸⁹ Restaurants Canada (which represents about 30,000 employers in the food services industry) echoed the position of the CEO's of the two large fast food chains, claiming that there were not enough Canadian workers available to fill vacant positions and that restaurants needed low-skilled temporary foreign workers in order to keep their businesses open.⁹⁰

The government lifted the moratorium at the same time as it released *Overhauling the Temporary Foreign Worker Program: Putting Canadians First*, a report that introduced significant changes to the TFWP.⁹¹ ESDC Minister Jason Kenney, who as Minister of Citizenship and Immigration Canada between 2008 and 2013 had been responsible for the massive increase in the number of temporary migrant workers employed in Canada, complained that certain employers had started to rely on access to low-skilled migrant workers under the TFWP as an employment model.⁹² Not only did he announce that the government was looking towards phasing out access to low-wage temporary foreign workers he also characterized the migrant workers as "quasi-indentured."⁹³

The year before the federal election, the Conservative government essentially reversed its policy regarding low-skilled migrant workers. In June 2014, in *Putting Canadians First*, it announced that come October it would be severely restricting employer access to low-wage, defined as workers earning under the median Canadian wage of \$20 per hour, temporary migrant workers. Wages, rather than skills, became the method for targeting the different streams of the labour migration program. According to the government, instead of relying in low-wage migrant workers, employers should consider offering additional wages or benefits to attract local Canadian workers and make an effort to recruit underemployed groups, such

89. *McDonald's Canada CEO Calls Foreign Worker Controversy 'Bullshit'*, BRITISH COLUMBIA—CBC NEWS, Apr. 15, 2014, <http://www.cbc.ca/news/canada/british-columbia/mcdonald-s-canada-ceo-calls-foreign-worker-controversy-bullshit-1.2621151>.

90. Restaurant Canada, *Temporary Foreign Worker Moratorium: Take Action*, May 14, 2014, <https://www.restaurantscanada.org/en/issues/article/temporary-foreign-worker-moratorium-take-action-2955>.

91. Employment and Social Development Canada, *Temporary Foreign Worker Program: Putting Canadians First*, 2014, http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/overhauling_TFW.pdf.

92. Bill Curry, *Low-Wage Foreign Worker Program Faces Elimination: Kenney*, GLOBE AND MAIL, June 25, 2014, <http://www.theglobeandmail.com/news/politics/elimination-of-foreign-worker-program-will-be-on-the-table-in-2016/article19322845>.

93. Bill Curry, *Service Sector Sees Spike in Temporary Foreign Workers*, GLOBE AND MAIL, Apr. 22, 2014, <https://beta.theglobeandmail.com/news/politics/service-sector-sees-spike-in-temporary-foreign-workers/article18119462/?ref=http://www.theglobeandmail.com&>; Teresa Wright, *Q&A: Employment Minister Jason Kenney on EI and TFW*, THE GUARDIAN (CHARLOTTETOWN), Sept. 18, 2014, <http://www.theguardian.pe.ca/News/Local/2014-09-19/article-3875241/Employment-Minister-Jason-Kenney-on-EI-and-TFW/1>.

as youth, people with disabilities and members of Indigenous communities.⁹⁴ In fact, ESDC Minister Kenney described the TFWP as a form of government subsidy that distorted local wages.⁹⁵ This characterization stands in marked contrast to his 2009 defence of the low-skilled TFWP, when as immigration minister he claimed that the program was needed to dampen rising wage expectations of local teenagers.⁹⁶

Statistics provided in *Putting Canadians First* confirmed the suspicion that employing migrant workers under the low-skilled stream of TFWP had become a business model for some employers. Of the 12,162 employers who used the TFWP in 2013, 21% (2,578) had a workforce comprised of 30% or more temporary foreign workers. For almost 10% of employers (1,123), temporary foreign workers accounted for fully half or more of their workforce.⁹⁷ Seeking to end this practice, the government introduced a quota on the proportion of low-wage temporary foreign workers that a business can employ, which would begin at 30% of the total working hours at any worksite and be reduced to 10% by 2017. It estimated that once the quota was fully implemented, the intake under the low-wage migration program would be reduced by one-half, dropping from 31,099 in 2013 to an estimated 16,278 in 2017, with the number in BC declining from 5,227 to 2362 over the same period.⁹⁸ In addition to the cap, the government imposed a moratorium on the hiring of temporary foreign workers for ten occupations that require little or no education or training in the Accommodation, Food Services and Retail Trade sectors in economic regions with an unemployment rate at or above 6%. Food Counter Attendants, Kitchen Helpers and Related Occupations were at the top of the list. This initiative, which became effective in June 2014, was designed to reduce youth unemployment and the government estimated that it would reduce the number of temporary foreign workers by approximately 1,000 each year.⁹⁹ A general tightening of the TFWP accompanied the cap and moratorium. The renamed labor market test (it is now called the Labour Market Impact Assessment (LMIA)) became more comprehensive and rigorous; its cost for employers increased fourfold and its duration was reduced from two years to one. The federal government also

94. Employment and Social Development Canada, *supra* note 86, at 13.

95. Wright, *supra* note 94.

96. Campbell Clark, *Skilled Immigrants Squeezed Out for Temporary Workers*, GLOBE AND MAIL, July 23, 2009, <https://beta.theglobeandmail.com/news/politics/skilled-immigrants-squeezed-out-for-temporary-workers/article562009/?ref=http://www.theglobeandmail.com&>.

97. Employment and Social Development Canada, *supra* note 86, 9-10

98. *Id.* at 10.

99. *Id.* at 11.

announced its commitment to enforce the terms of the employment authorization.¹⁰⁰

Industry response to the changes to the rechristened low-wage stream of the TFWP was far from positive. The president of the B.C. Restaurant and Foodservices Association declared that Kenney had overreacted, creating "chaos" for small business people in British Columbia."¹⁰¹ Significantly, the Canadian Federation of Independent Business, an influential lobby group with a large membership in the food services and hospitality sector, proposed a special stream, based on bilateral agreements with sending countries and modeled on the Seasonal Agricultural Workers Program, for hospitality and retail workers.¹⁰² This dedicated stream would provide a pathway to permanent status, enable migrant workers to switch employers within the sector, a bill of rights for migrant workers, stricter enforcement rules, lower fees, and wages based on those paid to Canadian residents who work in the same establishment. It was designed to achieve food services employers' primary goals while at the same time responding to criticism that employers in the sector exploited migrant workers. By providing temporary migrant workers with access to permanent residence via employer sponsorship the proposed scheme would virtually guarantee high commitment from the workers without the need to improve the poor terms and conditions of employment. It would also reduce the wages employers would need to pay to migrant workers because the wage rate would be pegged at the level paid to Canadian residents who work in the same establishment rather than at the higher prevailing rate. From the industry perspective, the beauty of the scheme is that it would reduce turnover, increase employee commitment and reduce worker exploitation while simultaneously maintaining flexible employment relations and low wages.

While the widespread use of migrant labor in the fast food sector was not used to undercut the wages of local workers, the medium and longer term effect of a dedicated low-skilled labor migration scheme is to reduce pressure on employers either to increase wages and improve employment conditions or improve productivity through the use of technology and more efficient systems. There is some evidence that heavy reliance on migrant workers in some low-skilled occupations suppressed wages.¹⁰³ During the boom, wage increases for occupations on the "Under Pressure" list were no higher than other occupations, which runs contrary to conventional labor market

100. It announced that it was massively increasing the number of inspections, which will be targeted by the use of tips, random audits, and risk assessments, and it dramatically expanded the authority and powers of inspectors and enlarged its enforcement tool kit.

101. Giovannetti & Curry, *supra* note 84.

102. Canadian Federation of Independent Business, Taking the Temporary out of the TFWP, Dec, 2014.

103. Fudge & MacPhail, *supra* note 31, at 43.

predictions that occupations experiencing labor shortages would experience higher than average wage increases. A closer analysis of wages in the Accommodation and Food Services sector supports this finding.¹⁰⁴

The evidence that the dedicated low-skilled migrant labor scheme had a negative impact on the employment opportunities of Canada's low-skill workers is equivocal. A 2014 report for the C.D. Howe Institute noted that deregulating the low-skilled stream of the TFWP accompanied an increase in the unemployment rate of the pool of potential recruits to the food service sector, low-skilled local workers, in British Columbia.¹⁰⁵ By contrast, a 2015 report prepared by the Parliamentary Budget Office concluded that there was evidence that there was some short-term tightness in the market for lower-skilled positions in smaller centers in British Columbia.¹⁰⁶ However, it went on to observe that if employers are granted easy access to migrant workers they will delay introducing "the required productivity-enhancing investments that would allow them to offer higher compensation to attract domestic workers while mitigating price increases."¹⁰⁷ Instead of investing in training and creating the conditions to attract a committed workforce, fast food chains preferred to recruit migrant workers who would put up with the existing conditions in order to have the chance of obtaining permanent residence in Canada.

E. Liberalizing the TFWP: Concocting a Sector-Specific Stream?

In April 2015, the 2011 rule limiting migrant workers in most jobs to four years in Canada came into effect, forcing thousands to leave the country. With the stricter immigration controls, the number of labor market impact assessments that were approved for low-wage migrant workers dropped from 58,502 in 2013 to 10,980 in 2015.¹⁰⁸ However, it is important to note that the number of employment authorizations for low-skilled workers began to decline before the 2014 reforms as a result of economic factors. Yet, the steep drop—a 70% decline—in work permits for during the first quarter of 2015

104. Judy Fudge & Fiona MacPhail, *Temporary Migration and Precarious Employment in Canada: Illustrations from the Restaurant Sector*, paper presented at ILO Regulating Decent Work Conference, 2013.

105. Dominique Gross, *Temporary Workers in Canada: Are They Really Filling Labor Shortages*, C.D. Howe Institute Commentary No. 407, 2014, 14, Apr. 20, 2015, http://www.cdhowe.org/pdf/commentary_407.pdf.

106. Lemieux & Nadeux, *supra* note 78, at 21.

107. *Id.* at 21.

108. Bryan May, *Temporary Foreign Worker Program*, Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, 42nd Parliament, 1st Sess., Sept. 2016, at 7.

as compared to 2014 suggests that the reforms targeting this group of workers had a significant impact.¹⁰⁹

Although the crackdown on temporary workers did open up some jobs for young Canadians in tourism, hotels, and restaurants, some employers in the hospitality sector shifted to other sources of migrant labor, employing young holidaymakers, which in Canada are admitted under bilateral International Experience Agreements, and international students, who since June 2014 were no longer required to apply for a work permit in order to be employed for twenty hours during term and full-time outside of term.¹¹⁰ However, for employers in the fast food sector, the problem with these migrant workers is that they are free to change employers and to work in different sectors, and few intend to make a career of working in fast food outlets. Thus, these migrants do not meet their needs, which are minimizing labor turnover and recruiting hard working and committed employees.

Despite its attempt to garner electoral support by blaming low-skilled migrants and rogue employers for unemployment and underemployment in the hospitality sector, the Conservative government lost the October 2015 federal election. Since taking power, the Liberal government has not been constrained by immediate electoral concerns, which were fueled by media reports of migrant workers taking Canadians' jobs. It has sought to build a consensus around the TFWP in general and the low-wage stream in particular, which involves responding to employer demands for low-wage workers while simultaneously allaying concerns that employers resort to migrant workers because they are easier than locals to exploit.

In February 2016, the Liberal government took its first steps, granting an exemption on the caps on low-wage TFWP for seasonal industries, enabling them to hire unlimited numbers of such workers for 180 days, and announcing that a parliamentary committee would be conducting a review of the TFWP. In late June 2016, just as the parliamentary committee's public hearings wound up, the government announced that the cap on low-wage workers would "temporarily" be frozen at 20% of the working hours at each workplace (or at the employer's current level, whichever is lower) for businesses that have been using the program for more than two years.¹¹¹

109. Kareem El-Assal & Arthur Sweetman, A Primer on Canada's Foreign Workers, Conference Board Canada 39-4129-30, 2016, at 37. However, the fact that the federal government can simply categorize migrants in different ways makes it difficult to get a clear understanding on migrant labor flows and the impact of immigration controls.

110. Alia Dharssi, *Desperate Canadian Businesses Seek Changes to Temporary Foreign Worker Program*, CALGARY HERALD, Sept. 14, 2016, <http://calgaryherald.com/news/national/desperate-canadian-businesses-seek-changes-to-temporary-foreign-worker-program>; Garnett Picot & Arthur Sweetman, Making it in Canada: Immigration Outcomes and Policies, IRRP Study, No. 29, Apr. 2012, at 32.

111. A 10% cap was to have come into effect in July 2016.

In September 2016, the Parliamentary Committee released its report.¹¹² The majority report, which was dominated by Liberals, provided a blueprint for liberalizing the low-wage stream of the TFWP program and revising it in order to reduce the potential for employers to abuse migrant workers. It recommended: abolishing the four-year cumulative duration rule; returning to a system of targeted streams with specific rules; reviewing the restrictions on low-wage positions in accommodation, food services, and retail; abolishing employer-specific visas and substituting sectorial or regional ones; providing multiple seasonal visas; establishing a pathway to permanent residence for all migrant workers; and moving away from complaint-driven enforcement.¹¹³ In broad outline these recommendations were similar to the proposals advanced by the CFIB. They also addressed the Canadian Labour Congress's concerns that migrant workers' be given access to permanent residence and that enforcement shift from a complain driven to pro active model, as well as migrant advocacy groups' demands that the four-year cumulative residence rule be.¹¹⁴

At the end of 2016, the federal government abolished the four-year maximum duration for migrants admitted under the TFWP and the minister responsible for immigration expressed his support for developing pathways to permanent residence for temporary migrants.¹¹⁵ The open question is whether the Liberal government will develop a sector-specific scheme for migrant workers in the hospitality sector. Not only do employers in the sector support it, now that it is out of power, so too does the Conservative Party. Or will food services employers increase their reliance on international students, as is the case in Australia?¹¹⁶

International students make up a significant share of foreign workers eligible to participate in the Canadian labor market. In 2014, there were 336,497 international students in Canada, reforms have made it easier for them to work and they are also eligible to obtain Post-Graduate Work Permits, which have been used to provide a supply of workers low-skilled service sector jobs.¹¹⁷

112. May, *supra* note 109.

113. *Id.* at 35-39.

114. However, the CLC was unhappy with the report, calling it "pro-employer," <http://canadianlabour.ca/news/news-archive/committee-recommendations-fall-short-migrant-workers>.

115. Government of Canada takes early action to improve the Temporary Foreign Worker Program, Dec. 13, 2016, <http://news.gc.ca/web/article-en.do?nid=1168949>; *Canada May Grant Easier Residency for Foreign Workers: Minister*, REUTERS CANADA, Sept. 11, 2016, <http://ca.reuters.com/article/topNews/idCAKCN11H0LG>.

116. Iain Campbell, Martina Boese & Joo-Cheong Tham, *Inhospitable Workplaces? International Students and Paid Work in Food Services*, 51 AUSTL. J. SOC. ISSUES 279 (2016).

117. El-Assal & Arthur Sweetman, *supra* note 110, at 32; Simona Choise, *International Student Work Program Creating Low-Wage Work Force: Report*, GLOBE & MAIL, Mar. 31, 2016.

IV. CONCLUSION

Jobs in the food services sector in general and the fast food industry in particular illustrate how institutional and regulatory frameworks shape both labor demand *and* supply. Food service jobs are marked by low wages, insecurity, ineffective regulation, monotony and lack of autonomy. The available "local" labor pools are not particularly attractive to fast food employers in British Columbia because the workers do not have the "soft" skills—work ethic and commitment—that they want. At the same time, employers have been unwilling either to improve the terms and conditions of work or in order to recruit or to devote the resources needed to train a high commitment workforce in the food services sector. Instead they have sought to "relocate to global labor pools supplying workers with desirable characteristics that can resolve industry-specific challenges."¹¹⁸ The key conditionalities imposed by the low-skilled (now low-wage) TFWP, linking the migrant workers' visa to an on-going employment relationship with a specific employer and making entitlement to permanent residence dependent upon obtaining employer support, make these workers an attractive supply of labor in an industry that lacks high commitment workers and that complains about high employee turnover.

In British Columbia, employment standards are already very low and difficult to enforce, and in the fast food sector minimum wages set the wage level. While this flexible regulation reduces labor costs in the short term, the problem it poses for employers is that it results in high turn over and poor service. In this context, the labor migration scheme enabled employers to recruit a high-commitment and stable worker force without having to improve wages or working conditions. As such, it functioned as alternator that enabled consumers to enjoy low-cost fast food and the industry to benefit from a larger and growing market. Other migrant workers, such as international students or holidaymakers, are available and employed by food services employers, but the conditionalities imposed by their visas have not provided employers with the committed and stable workers they desire.

This case study of the fast food sector in British Columbia demonstrates how labor market institutions and regulations in that sector shaped employers' demand for migrant labor and how this demand influenced federal immigration policy. Nevertheless, while a sector-level analysis is an important supplement to comparative political economy studies that focus on how national varieties of capitalism influence immigration policies, it is also critical to attend to the regulatory diversity within a sector across national

118. Polanco Sorto, *supra* note 45, at 92.

divides.¹¹⁹ National and sub-national labor market institutions and regulations result in differing employment standards within the same sector. Moreover, immigration policies are not simply a response to employer demands, but are also shaped by trade union concerns, broader understandings of the “nation” and immediate electoral concerns, as well as policy borrowing from other countries.¹²⁰ Comparative case studies of the use of migrant labor in a specific sector in different countries would help to illuminate the symbiotic relationship between labor and immigration law as well establish the links between the treatment of migrant workers and the impact of labor migration on national workers and territorially bounded labor laws.

119. Alfonso & Devitt, *supra* note 2, at 605.

120. Chris F. Wright, *Why Do States Adopt Liberal Immigration Policies? The Policymaking Dynamics of Skilled Visa Reform in Australia*, 41 J. ETHNIC & MIGRATION STU. 306 (2015).

