

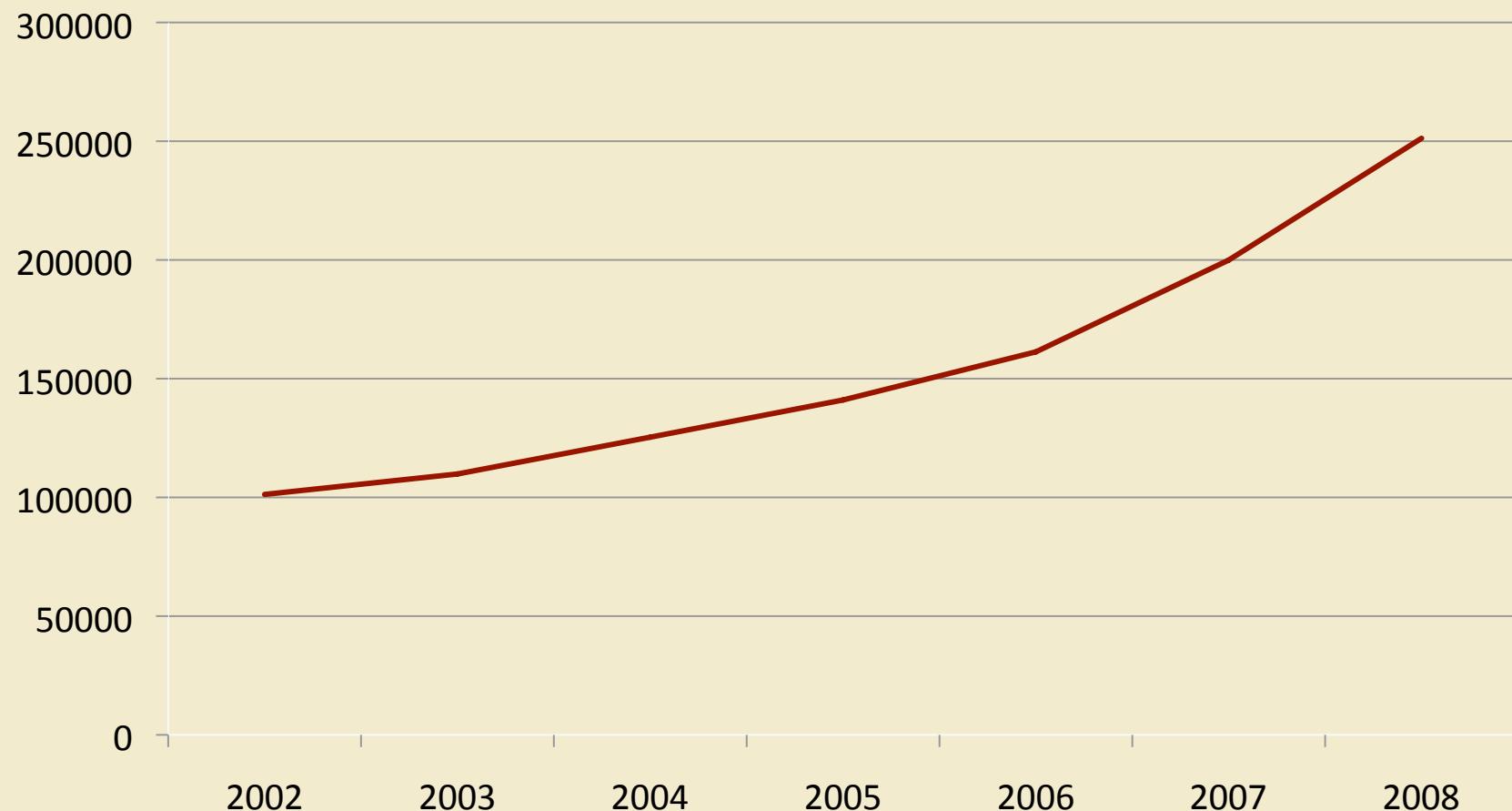
TEMPORARY FOREIGN WORKER PROGRAM

RIGHTS OF TEMPORARY WORKERS
AND
EMPLOYERS' RESPONSIBILITIES

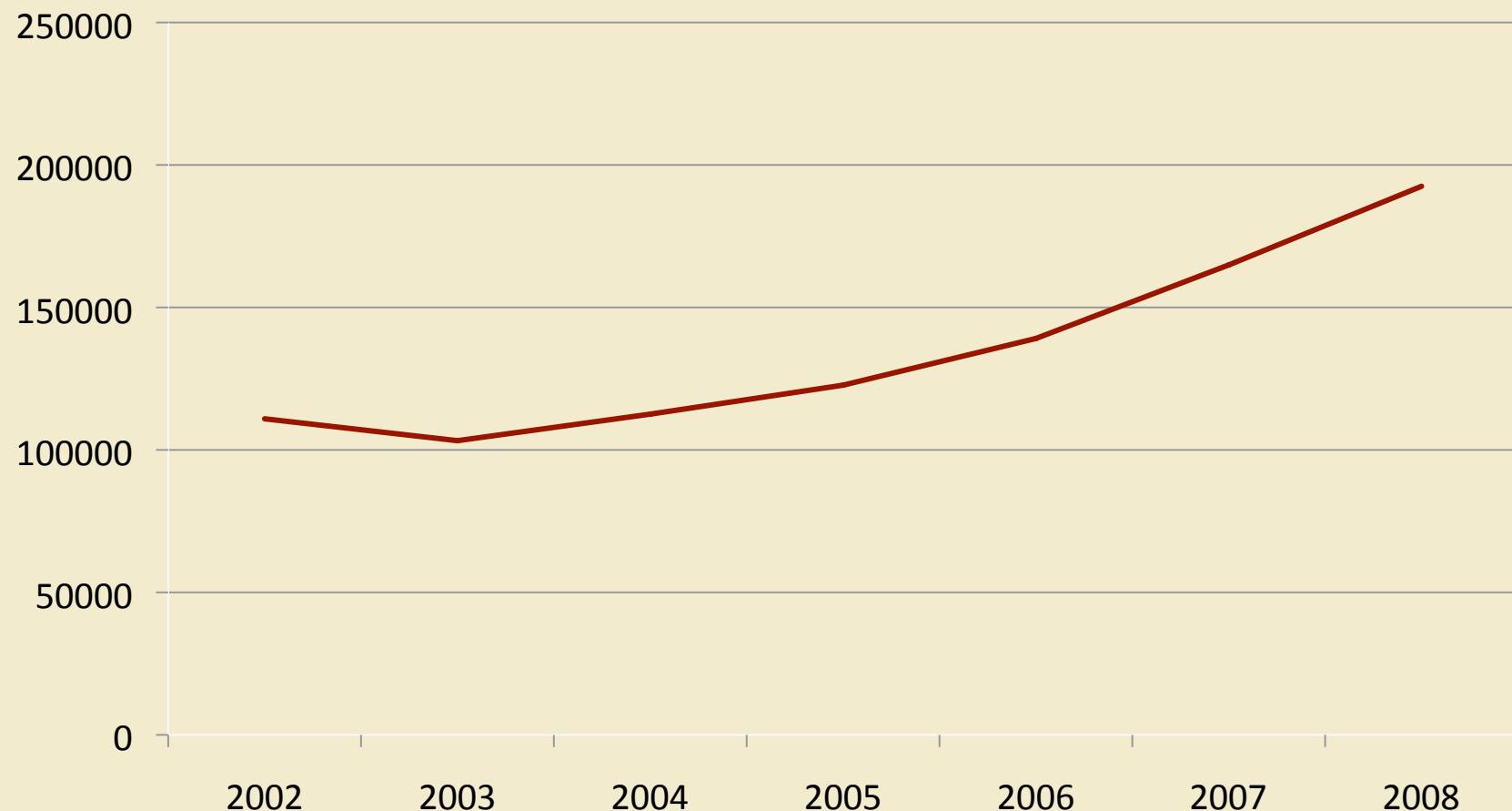
Delphine Nakache, University of Ottawa
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How many temporary
foreign workers (TFWs)
are there?

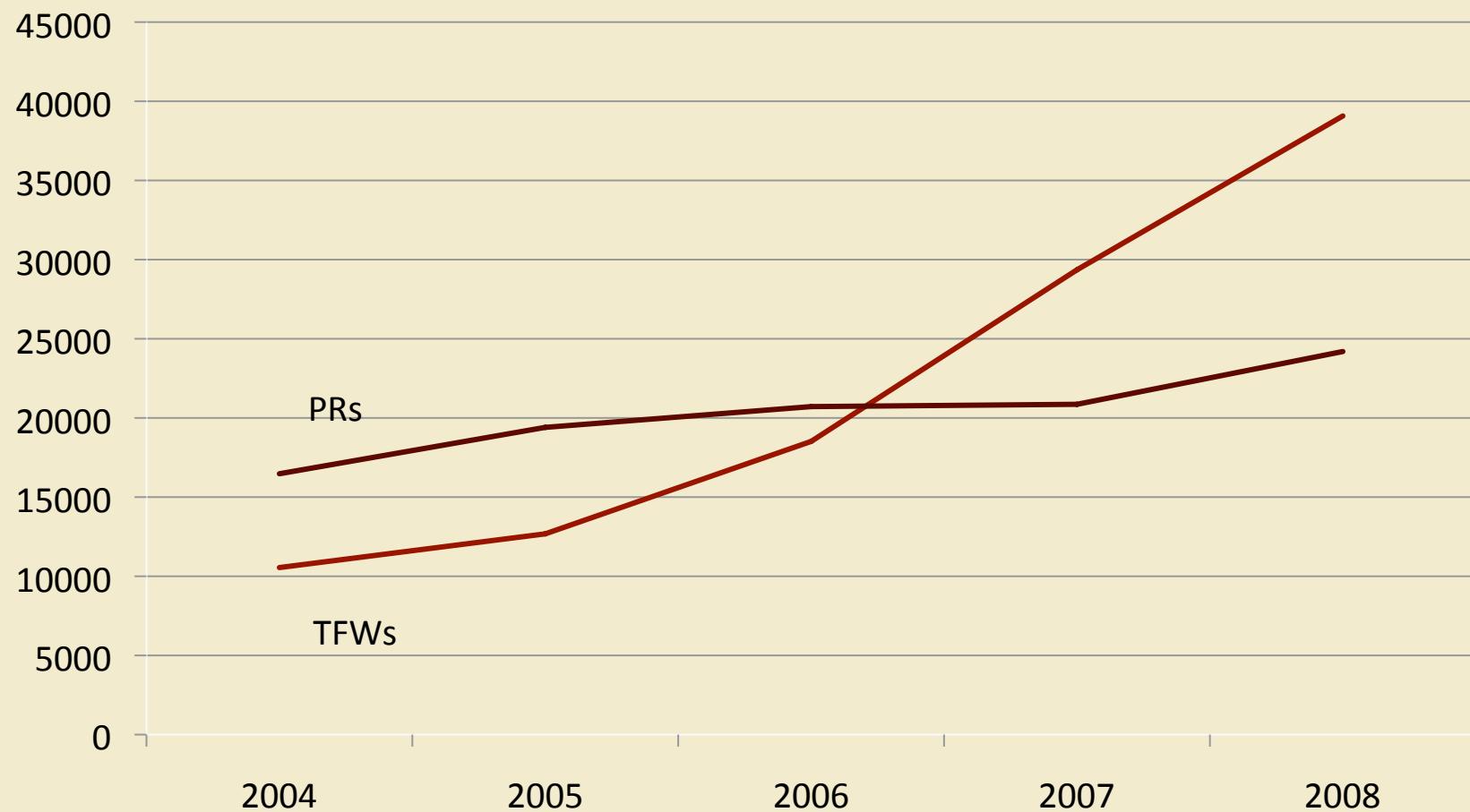
The Number of TFWs in Canada as of December 2008 (CSA 2009a)



Total Entries and Re-entries of TFWs to Canada



Entries of TFWs and Entries of Permanent Residents to Alberta



How does the country of
employment view
temporary foreign
workers?

Three Policy Perspectives

1. The migrant is offered the opportunity to stay and integrate.
2. The country of employment is indifferent to the migrant's future position in society.
3. The aim of the official rules is to prevent the integration of migrants.

Into which policy
perspective does
Canada, more
specifically, Alberta
fit?

A Focus on Two Main Issues:

1. Employment-related rights and the realization of workplace rights for TFWs;
2. Family accompaniment and access to permanent residency from within.

Major Finding:

- A variety of players and policies – a potential to create protection gaps within the administration of the program;
- Restrictive nature of the work permit - limits workers' ability to change employers and thus limits the protections that otherwise would be available to them.

Are TFWs protected
against exploitative
employment agencies?

Employment Agencies

Employment Agency Business Licensing
Regulation (Fair Trading Act), section 9:

“No business operator may directly or indirectly demand or collect a fee, reward or other compensation from a person who is seeking employment...or for securing or endeavoring to secure employment for the person.”

Employment Agencies

- BUT.... Employment Agencies do charge
- Legally, they charge employers
- Legally, they charge employees for settlement services—sometimes exorbitant amounts
- Illegally, they charge employees for finding work, and without consequence

Are TFWs eligible for employment insurance?

Employment Insurance Act of Canada

18. A claimant **is not entitled to be paid benefits** for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was:

- (a) capable of and **available for work** and unable to obtain suitable employment;
- (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would **otherwise be available for work**...

The Jurisprudence

“I have considered the evidence in this case and I must agree with the decision of the Board. It is unfortunate that the claimant did not have a work permit so that she could work for other persons while in this time frame of the work permit. Her permit, however, was restricted and when that ended, she could not claim employment insurance benefits based on that employment, because once that employment ended she no longer had the ability to work anywhere else.”

-CUB 73624, X (Ritchie, J.), Nov. 4, 2009

Digest of Benefit Entitlements Principles

“A person who is only allowed to work for one employer, or who has a non-renewable work permit is not available to accept work, and is rightly disentitled from collecting benefits. It is of no benefit for a person in this situation to argue that they are willing to seek work anyway, and that they have no intention of refusing any employment opportunities that arise.”

YET...

“A claimant who does not currently possess an Employment Authorization is not necessarily unavailable for work.”

Note: The Digest of Benefit Entitlement Principles states that section 10.10.8 is currently under review.

In practice in AB, EI is granted on first appeal for TFWs.

Service Canada
Canada Place, Floor Main
9700 Jasper Avenue
Edmonton, Alberta
T5J4C1

DATE

Dear Sir or Madame:

RE: **First Name LAST NAME**
SIN XXX-XXX-XXX
APPLICATION FOR EMPLOYMENT INSURANCE BENEFITS

First, let me introduce myself. I am the ---title--- of the Foreign Worker Program at the Edmonton Community Legal Centre. ECLC provides legal services and related outreach and support services for low income people. I am providing assistance to ---name---, who has requested our assistance in obtaining Employment Insurance benefits. I enclose a copy of our "Authorization to Disclose Information" for your records.

I understand that ---name---'s application for Employment Insurance benefits was denied. ---name--- was notified of this decision by letter dated ---date---. I enclose a copy of the letter for your reference.

I am writing on ---name---'s behalf to provide new information which could change this decision. If this new information does not change this decision, then I am writing to confirm that ---name--- would like to appeal this decision. I enclose a Notice of Appeal to the Board of Referees in case an appeal is necessary.

The decision letter indicates that ---name--- was denied EI benefits because Employment Authorization restricts him to ---employer--- and had therefore not proven his availability for work in Canada.

---name--- has a work permit which is valid until ---date---. According to Citizenship and Immigration rules, ---name--- is eligible to remain in Canada and seek employment with other employers. Once he obtains a job offer from a new employer who is authorized to hire a foreign worker (by obtaining a Labour Market Opinion from Service Canada), he is able to apply for a new

work permit from Citizenship and Immigration Canada. Once a new work permit is issued, he can work for the new employer. ---name--- is diligently looking for work.

---name--- is permitted to seek work with other Canadian employers, his work permit is renewable, and his work permit has not expired permanently. These are the criteria noted in the Digest of Benefit Entitlement Principles, section 10.10.8. It is my understanding that this policy has been clarified internally, and that the current policy is now even more clear. I understand that Temporary Foreign Workers with a valid work permit are to be treated the same as Canadians or permanent residents, and are to be considered available for work for the purposes of being eligible for Employment Insurance.

I request that the ---date--- decision be reconsidered in light of the new information in this letter, and that entitlement to Employment Insurance be granted immediately.

In the alternative, if Employment Insurance benefits are not granted immediately, we give notice that we are appealing the decision.

Please do not hesitate to contact me if I can provide any further information.

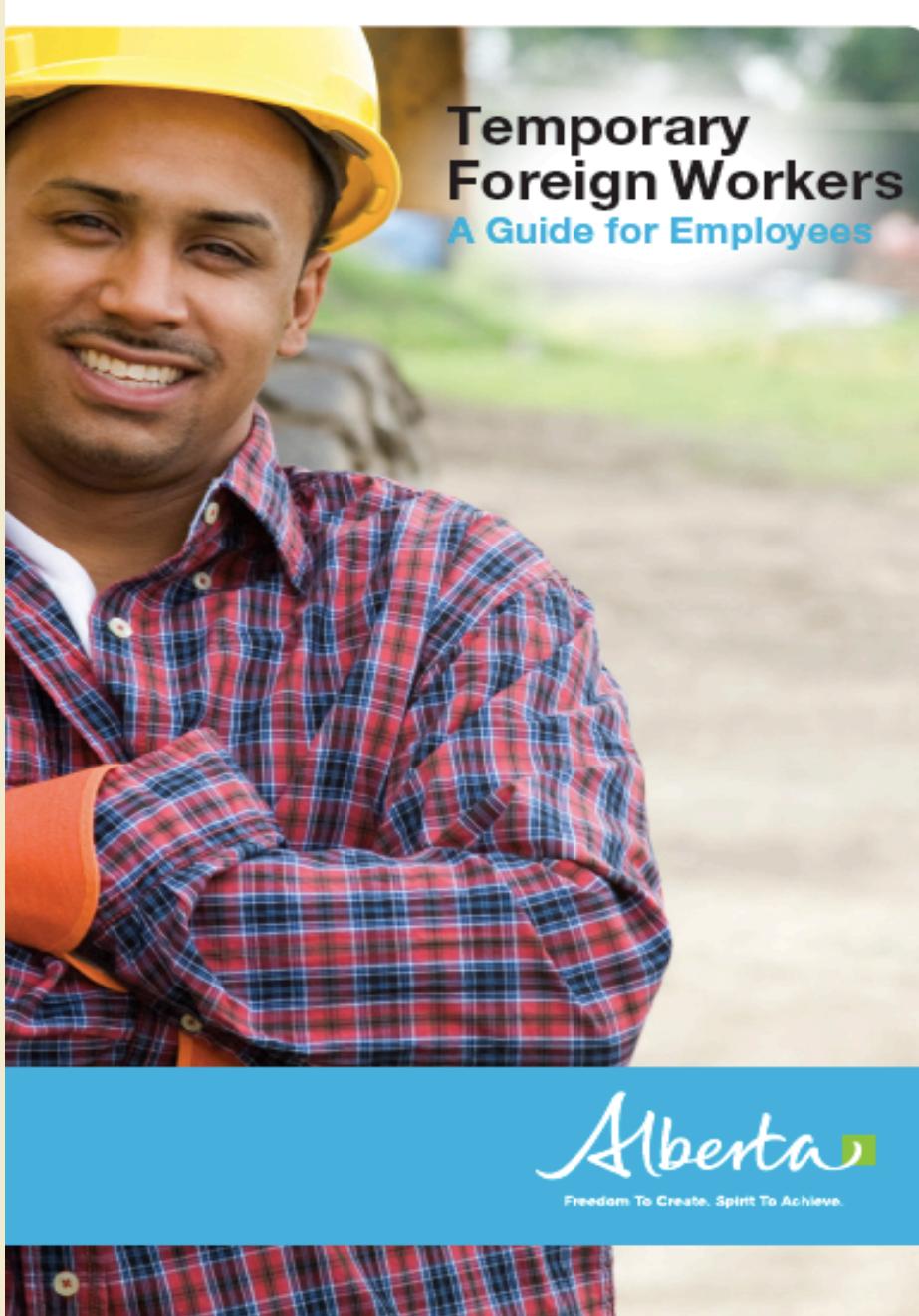
Sincerely,
EDMONTON COMMUNITY LEGAL CENTRE

Name
Title
Foreign Worker Program

First Name Last Name
Claimant

Enclosures - Authorization to Disclose
- Refusal Letter
- Work Permit
- Appeal Form

In practice, do TFWs have
the same employment
rights as any other
worker?



A Publication of Alberta's Dep't of Employment and Immigration

Published in 14 Languages

Chinese	Punjabi
English	Romanian
French	Spanish
German	Tagalog
Hindi	Thai
Korean	Ukrainian
Polish	Vietnamese



Temporary Foreign Workers

A Guide for Employees

“As a temporary foreign worker in Alberta, you have the same rights and responsibilities as any other employee in the workplace. You are protected under Alberta’s employment standards, workplace health and safety and workers’ compensation legislation.”

Employment Standards Code (ESC): The Complaint Process

Steps:

1. Fill in the self-help kit and give it to employer
2. File a complaint with employment standards
3. File an appeal (employer or employee)

Some Problems:

1. TFWs may not know their Employment Standards rights.
2. The ESC can only deal with minimum rights within the employment contract.

Some Problems with the Complaint Process under the ESC

1. TFWs may not know their ESC rights nor be aware of the complaint process.
2. ES officers have limited authority to deal with minimum ESC rights, not with other violations of the employment contract.
3. TFWs might be fired for complaining, and cannot easily obtain alternate employment because of work permit restrictions.
4. The forms and instructions are in English only.
5. The time for a complaint and appeal might extend past the expiration date of the visa.

Protections under the ESC: Are they of limited value to the TFW?

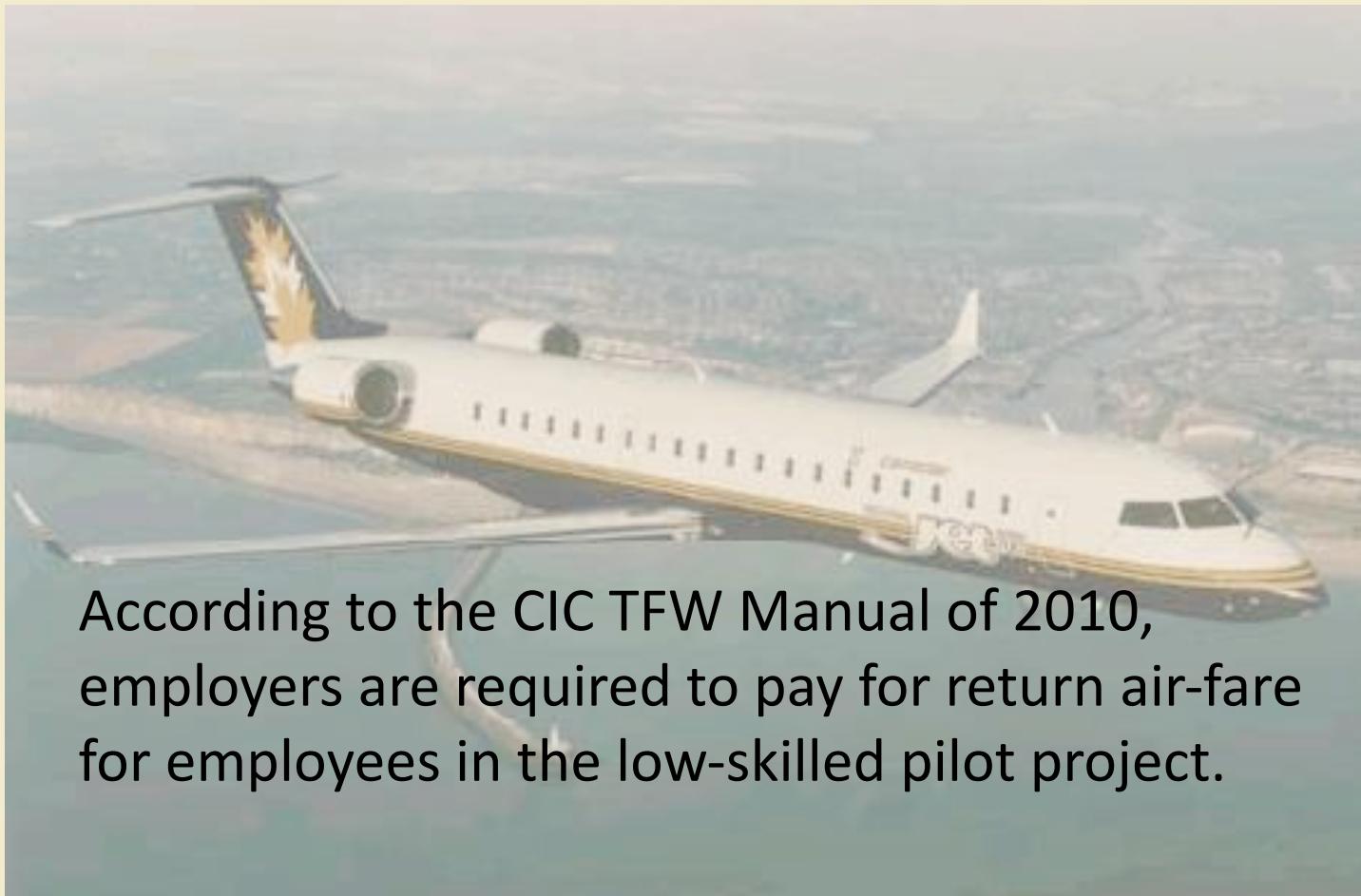
Termination Notice/Pay (ESC s. 56) bridges the gap between old and new employment. However, there is only one week of termination pay/notice if the employee has been employed by the employer for more than 3 months but less than 2 years.

Limited Value for TFWs? As of February 2010, it takes approximately 4 months to get new employment: 2 weeks to advertise, 10 weeks to process the Labour Market Opinion (LMO), and 3 weeks for the work permit. Furthermore, LMOs are now difficult to obtain.

Maternity/Parental Leave (ESC s. 45 & 50) Employees of over 52 weeks are entitled to take Maternity/Parental leave so to be able to return to their previous employment contract.

Limited Value for TFWs? TFWs are not entitled to return to their previous contracts if their work visa has expired.

Return Airfare



According to the CIC TFW Manual of 2010, employers are required to pay for return air-fare for employees in the low-skilled pilot project.

Problems with Enforcement of Return Air-fare

- HRSDC's Position: "The Government of Canada is not a party to the contract. Human Resources and Skills Development Canada (HRSDC)/Service Canada (SC) have no authority to intervene in the employer-employee relationship or to enforce the terms and conditions of employment."
-HRSDC Instruction Sheet to Accompany the Employment Contract

Response of Alberta Employment Standards:

“Since this is considered an expense, required under Service Canada’s Labour Market Opinion but which is outside of the scope of Employment Standards, I am unable to enforce payment for airfare on your behalf. As discussed, you will decide whether or not to submit your claim to HRSDC (Human Resources and Social [sic] Development Canada) for their investigation.”

Options for TFWs whose Employers Refuse to Pay Return Air-fare

1. Court Proceedings (yet a TFWs work permit might have expired prior to a court date).
2. A TFW can pay for his/her own flight (yet a TFW in the low-skilled pilot project may lack the means to pay).
3. A TFW can report to CBSA for a removal order (yet the TFW will then be barred from returning to Canada).
4. A TFW can remain in Canada illegally.

In practice, do TFWs have
the same right to
workers' compensation
as any other worker?

Workers' Compensation

Two Important Goals of Workers' Compensation in Alberta are:

- 1) **Focus on Return to Work** “We work with you to develop case plans that set appropriate recovery goals. By providing needed benefits and services, and assisting employers in developing disability management and modified work programs, ***we help achieve a safe return to work.***”
- 2) **Commitment to Fairness** “We protect workers and employers by providing no-fault coverage. We will provide clear decisions and ***consistent interpretation of the Workers' Compensation Act.***”

(2010 WCB-Alberta Worker Handbook)

Consistent Application May Sometimes Be Detrimental for TFWs

Workers' Compensation Act, s. 56 (8) & (9)

Compensation lasts only as long as a person is physically unable to return to work, including modified duties or a different job.

Consistent application means: WCB is only concerned with physical impediments to work, not legal impediments. Compensation will be decreased or terminated for a TFW who is physically able to perform modified work or to take a different job even if he/she is legally barred from doing so.

Yet consistent application can be beneficial for TFWs

- Foreign workers can be compensated regardless of their legal status in Canada;
- Foreign workers can be compensated even if they have returned home;
- Compensation is in Canadian funds calculated according to Canadian wages, regardless of where the TFW presently resides;
- WCB will fly a worker back to Canada if treatment in Canada is necessary.

WCB Poster

Workers'
Compensation
Act of Alberta:

Section 145:
Employers are
required to
have poster
posted in a
conspicuous
place.

But there is no
requirement that
poster be in the
language(s) used by
the workforce.



Published in 15
Languages:

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Chinese (Simple)
English
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German
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Vietnamese

WCB Heads Up Campaign



Despite the important increase in the number of TFWs in Alberta, there has been no correlative increase in the number of claims by injured temporary foreign workers.

Why are TFWs not reporting?

- 1) TFWs are safer workers since they do not have comparable compensation programs in their home countries.
- 2) TFWs do not know their rights.
- 3) TFWs are afraid of losing their jobs.

Do TFWs have access to permanent residency?

Access to Permanent Residency

Four avenues are available:

1. The Live-In Caregiver Program (reserved for Live-in Caregivers)
2. The Federal Skilled Worker Program
3. The Canadian Experience Class
4. The Provincial Nominee Program (PNP)

Two Step Process: Temporary Foreign Worker to Permanent Resident

- There are Differences in the Treatment of the Highly Skilled and Lower Skilled TFWs.
- Beside the Live-In Caregiver program, lower skilled workers are, for the most part, ineligible to apply for permanent residency by way of a two-step process (temporary to permanent).

Two-Tiered Nature of the TFW Program

- Regulatory changes proposed by the CIC in October 2009 (not yet in force): 4 years here then 6 years away.
- Presently, there is no limit to the number of renewals under the current legislation.

“This provision would signal clearly to both workers and employers that the purpose of the TFWP is to address temporary labour shortages, as well as encourage the use of appropriate programs and pathways to permanent residency in order to respond to the long-term labour needs of employers.”

(Canada Gazette 2009)

PNPs: Limited Opportunity for Lower-Skilled TFWs to Migrate Permanently

1. Only those within certain industries can apply.
2. A full time permanent job offer is needed.
3. The employer must participate fully.

In Alberta, there is a set number of nomination allocations for each industry (600 in the food services industry, for example).

Are family members able
to accompany a TFW to
Canada?

Family Accompaniment: Differences between the Skilled and Lower Skilled

- A potential employee must demonstrate to an immigration officer his/her ability to support dependents while in Canada.
- The spouse of a skilled worker is entitled to enter Canada with an open work permit.
- The spouse of a TFW under the low-skilled pilot project requires an LMO.

Into which policy
perspective does
Canada, more
specifically, Alberta
fit?

Policy Perspectives

1. The migrant is offered the opportunity to stay and integrate.
2. The country of employment is indifferent to the migrant's future position in society.
3. The aim of the official rules is to prevent the integration of migrants.

Two different policy perspectives

1. Employment-related rights of TFWs –

Policy perspective no. 2

TFWs under the TFWP are limited from full participation, integration and protection because of the practical and legal parameters placed around their employment-related rights.

2. Family Accompaniment and Access to PR

Policy perspective no. 1 for skilled TFWs

Policy perspective no. 2 for lower-skilled TFWs

There have been some improvements in protections for TFWs:

- Canada-Alberta Working Group on TFWs
- Voluntary monitoring program for employers
- Temporary Foreign Worker Advisory Offices (Edmonton & Calgary) and the Alberta Temporary Foreign Worker Hotline
- Ad hoc inspections by Employment Standards Officers
- Funding to settlement services to aid TFWs

Recommendations

1. Make the work permit sector- or province-specific rather than employer-specific.
2. More inspectors and more inspections.
3. Provide a legislated enforcement mechanism for contractual right of return air-fare.
4. Implement federal regulations aimed at the monitoring and compliance of employers applying for new LMOs.

Recommendations Continued

5. Allow open work permits for all spouses.
6. Improve communication between different government departments.
7. Implement provincial legislation similar to Manitoba's *Worker Recruitment and Protection Act*.
8. Increase/continue funding to settlement programs.

Finally...

9. Increase public debate on the question of immigration policy:

Is it really in Canada's best interest to develop policies which do not allow the long-term lower skilled TFW to obtain permanent resident status?

"We invited guest workers, and got human beings"

--Max Firsch. Quoted in: International Labour Office, "Towards a fair deal for migrant workers in the global economy"

About the researchers...

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Paula J. Kinoshita graduated with a bachelor of laws from the University of Alberta in 2009. Presently, she is completing her articling year at Quantz Law Group in St. Albert, Alberta.

Nakache, Delphine and Paula J. Kinoshita. 2010. “The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?” *IRPP Study, No. 5.*

http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no5.pdf